The Central Law Journal.

ST. LOUIS, JUNE 24. 1881.

CURRENT TOPICS.

The Supreme Court of Pennsylvania recently rendered a very important decision upon the question of a lunatic's contracts. The facts of the case (Wirebach v. Bank of Easton), were as follows: A lunatic, became the indorser for accommodation upon a negotiable promissory note which was subsequently negotiated and came into the hands of an innocent holder for value. Said Trunkey, J., in delivering the opinion of the court: "Where a person fairly and in good faith, sells property, or loans money to a unatic who appears to be sane, and is not nown by the vendor or lender to be insane, and who has not been found to be a lunatic by judicial proceedings, and the lunatic receives and uses the same, whereby the contract becomes so far executed that the parties can not be placed in *statu quo*, such a contract can not afterwards be set aside, or payment refused by the lunatic, or his representatives. La Rue v. Gilkyson, 4 Barr, 375; Beals v. See, 10 Barr, 56; Lancaster County Bank v. Moore, 28 P. F. S. 407; Wilder v. Weakley, 34 Ind. 181; Elliott v. Ince, 7 DeG. M. & G. 475, 487." After further discussing these authorities the opinion then proceeds to say that the question presented is: will an action lie on the accommodation indorsement of a promissory note by a lunatic? and in support of the view that the presumption in favor of commercial paper, is inapplicable to the case, quoted the opinion of Paxon, J., in Moon v. Hershey, 9 Nor. 196, as follows: "We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to commercial paper made by madmen. * * * The true rule applicable to such cases is, that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the status of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud, and upon a proper consideration."

"There must be a limit to the civil responsibility of persons of unsound mind, otherwise their property would be at the mercy of unscrupulous and designing men."

A statute recently passed in Pennsylvania makes an important change in the law of evidence, as applicable to the admission of testimony in life and fire insurance cases, of which mention here, may be of some value as a suggestion to the law makers of some of the western States. Where reference is made in an insurance policy to the application of the insured, or to any by-law or other rule of the company, as part of the contract, a correct copy of the by-law or other rule referred to, must be attached to the policy itself. Otherwise these instruments can not be used as evidence in any preceeding affecting the rights of the respective parties to the contract as set forth in the policy. The law applies to foreign companies as well as to those organized under the laws of Pennsylvania, and went into effect on May 11th. We think the idea a good one, and believe that the practical effect of such a law will be to prevent many cases of mistake or fraud.

EXEMPLARY DAMAGES.

III.

Exemplary damages are given in cases of trespass against either real or personal property whenever the injury is prompted by malice, and especially when the act of offense is accompanied by circumstances of insult, outrage or contumely. It is not necessary, however, that these circumstances should be present, it is sufficient that the act should be malicious. In Devaughn v. Heath,[1] it was held not to be necessary to recover such damages that the plaintiff should prove that the trespass had been committed in a "rude,

[1] 37 Ala. 595.

aggravating and insulting manner;" that rudeness, insult and aggravation were only concomitants of the offense from which malice might very properly be inferred. Of course, however, where such facts appear in the evidence they not only render the retribution inflicted upon the wrong-doer more certain, but far more severe. In Jasper v. Parnell,[2] plaintiff's premises were invaded at night, the house torn down, and the materials moved into the street. It was held that a verdict of $600 damages was sufficiently moderate, although plaintiff was only a holding-over tenant, his term having expired, and his building of very little value. It was further held that the fact that the principal defendant had been advised by counsel that he had a right to evict plaintiff, could not be permitted to go to the jury in mitigation of damages. A similar case was that of Carpenter v. Barber,[3] in which it was held that title and right of possession will not justify a forcible entry into a dwelling-house, and the expulsion of the tenant wrongfully holding over, and that it is not admissible to prove in mitigation of damages that defendant had been advised by counsel that he had a right to enter, if he could find plaintiff and his family absent; and further, that evidence that defendant was in collusion with plaintiff's housekeeper to secure a quiet entrance into the premises, is inadmissible in mitigation of exemplary damages. In Hufftalin v. Misner,[4] defendant, at the head of a number of persons, invaded plaintiff's premises at night, blowing horns and firing guns, and drove her and her children into the cellar, and, in fact, dispossessed her of the premises. A judgment for $1,100 exemplary damages was affirmed by the court, and it was held that defendant could not in mitigation of damages introduce evidence impugning plaintiff's title to the land. In Smalley v. Smalley,[5] a house was maliciously burned, exemplary damages given, and it was held that the commission of the wrong might be proved by circumstantial evidence, and although the act itself, being arson, was a felony in a criminal point of view, yet in the civil suit it was sufficient to prove the guilt of the defendant by a preponderance of testimony, and that "threats immediately preceding the burning, verified by the fact of the burning, were sufficient to justify the jury in finding the defendant guilty." Cutting down a *bois d'arc* hedge by an official, under color of changing a public road with an apparent design to harass and annoy the plaintiff, is a trespass for which a jury may give exemplary damages.[6] And such recovery may be had, although the land was at the time in possession of tenants holding under a contract to pay as rent one-third of the crops, for the injury inflicted was an injury to the inheritance.

Weston v. Gravelin,[7] was an action of trespass by a tenant for defacing walls, breaking windows, and the like, and it was held that exemplary damages were properly given, because the malicious intention was evident that the injuries were such as a tenant might sue for, that proof of the bad character of the house was not admissible in mitigation of damages, and that plaintiff need only prove his case by a preponderance of testimony, for the rule in civil cases is not to be varied, because the act complained of might subject the defendant to a criminal prosecution.

Exemplary damages may be recovered for a trespass in cutting and carrying off timber from plaintiff's land,[8] although plaintiff was not in possession, but he was held authorized to maintain the action because his title was generally known and recognized, and the discontinuance of his possession was explained in such a manner as to raise no presumption against his right.

The unnecessary stepping upon another man's land is usually a trifle which the law would disregard, but if the motive is bad, and the act has been attended by matters of aggravation, the least entry is a trespass, and exemplary damages may be lawfully given by a jury.[9] Where a squatter intruded upon the lands he had recently occupied, and removed the orchard which he had planted, and the fence rails which he himself had made and put on the land, and the removal was attended with circumstances of aggravation, such as indecorous and insulting language, he was held reponsible for the trespass in ex-

[2] 67 Ill. 358.
[3] 44 Vt. 441.
[4] 70 Ill. 55.
[5] 81 Ill. 70.
[6] Parker v. Shackleford, 61 Mo. 68.
[7] 49 Vt. 507.
[8] Kolb v. Bankhead, 18 Tex. 228.
[9] Johnson v. Hannahan, 3 Strobh. (S. C.) 425.

emplary damages.[10] It was held, further, that the orchard and the rails, when set up as a fence, were attached to the freehold, and their removal was an injury to the inheritance.

To justify exemplary damages there must be shown, in all cases of trespass to lands, either positive malice, or that wanton and reckless negligence which is generally held to be equivalent to it.[11] Where there is no malice, insult, or deliberate oppression, exemplary damages can not be given;[12] for wherever a defendant acts in good faith, and under an honest belief that he was legally entitled to do the act complained of, which, however, proved to be a trespass, he can not be subjected to exemplary damages.[13] To justify such a finding it is necessary that the entry be made with an unlawful intent on the part of the defendant.[14] It was even held that exemplary damages will not be permitted in a case where a holding-over tenant, having promised to vacate the premises, afterward refused to do so, and the building was pulled down to make room for a new edifice.[15]

Exemplary damages are also given where the personal property of the plaintiff is injured or destroyed by the malice or gross negligence, or wanton mischief of the defendant or his agents. Vicksburg, etc. R. Co. v. Patton,[16] was a case of this character in which the engineer of a train run his locomotive over the horses of the plaintiff and killed them, and a like case was that of Byram v. McGuire,[17] in which defendant's servants, by his orders, or in his presence, tied an animal of the plaintiff's in so imperfect and careless a manner that it was choked to death. The case of Merrills v. Tariff, etc. Co.,[18] was for injury to the personal property of the plaintiff under color of legal right to the premises in which the property was, and as the object of the injury appeared to be to break up the business of the plaintiff which competed with that of the defendant, the jury were instructed that they might give exemplary damages.

If, however, it appear by the pleadings and the testimony admissible under them, that the question is merely one of title, the damages allowed must be purely compensatory. Such a case was that of Plumb v. Ives,[19] in which some tobacco claimed by Mrs. Plumb, but which had been sold by her husband to defendant, had been carried off by him. The declaration was in the usual form *de bonis asportatis*, and it was held that under it the issue was only a question of title; that plaintiff could not give in evidence an assault upon her in the carrying away of the tobacco, no allegation of such assault appearing in the declaration, and that exemplary damages were not permissible. In Selden v. Cashman,[20] goods were seized under a void judgment, and it was held that if the evidence showed that defendant, who acted under the advice of counsel, had apparently no suspicion that the judgment was invalid and exhibited no malice, the plaintiff could not recover exemplary damages.

Exemplary damages may also be recovered for injuries to plaintiff's estate, growing out of the wanton or malicious abuse of legal process by the defendant. In Floyd v. Hamilton,[21] an attachment was procured against plaintiff, who, upon the failure to prosecute the attachment suit with effect, commenced proceedings upon the statutory bond, and upon appeal it was held by the Supreme Court that if the attachment were only *wrongfully* sued out the plaintiff could recover on the bond merely actual damages, but if it had been *vexatiously* sued out he could recover vindictive damages.[22] A like case was that of Barnett v. Reed,[23] in which an execution had been issued upon a judgment rendered for a debt that had been previously paid. It was held that the wanton and malicious issuance of the execution and sale of property under it, fully justified exemplary damages.

When a distress warrant was issued for $339, and it appeared that the defendant's

10 Mitchell v. Billingsley, 17 Ala. 391.
11 Cutler v. Smith, 57 Ill. 252.
12 Moore v. Crose, 43 Ind. 30.
13 Allison v. Chandler, 11 Mich. 542.
14 Brown v. Allen, 35 Iowa, 306.
15 Farwell v. Warren, 70 Ill. 28.
16 31 Miss. 156.
17 3 Head (Tenn.) 530.
18 10 Conn. 384.
19 39 Conn. 120
20 20 Cal. 56.
21 33 Ala. 235.
22 See, also, McCullough v. Walton, 11 Ala. 492; Kirksey v. Jones, 7 Ala. 622; Donnell v. Jones, 13 Ala. 490, 509.
23 51 Pa. 190.

actual and rightful debt was only $53, it was held,[24] that the question whether or not the process had been maliciously issued, and whether in consequence, the plaintiff could be allowed exemplary damages, was one for the jury. It was further held that one acting in good faith, under the advice of a respectable attorney, ought not, even though the advice be wrong, be subjected to vindictive damages, but to escape such consequences he must show that he acted in good faith, and that the attorney advised with a full knowledge of all the facts.

Where an attachment, however, has been sued out in good faith without malice or wantonness, neither exemplary damages nor compensation for the expenses of the suit can be given to the party injured.[25]

In actions of replevin exemplary damages may be awarded, provided there exist in the case the circumstances of malice, fraud, oppression or insult, which in other cases are necessary to justify such damages. To this effect was the decision in the case of Donald v. Schaife,[26] and those of Brizbee v. Maybee,[27] and Single v. Schneider,[28] and that of Schofield v. Ferris.[29] In Hotchkiss v. Jones,[30] on the other hand, it was held that in replevin exemplary damages cannot be recovered.

Akin to the abuse of legal proceedings by vexatious and groundless civil suits, is the like perversion of criminal process by false and malicious prosecution for pretended offenses against the law. Exemplary damages are awarded without question in all proper cases where actions are brought for malicious prosecution. In Malone v. Murphy,[31] the court makes some difficulty as to the propriety of allowing exemplary damages at all, considering the Greenleaf theory of damages the more logical, but accepts the opposite view as established law, and concedes that exemplary damages may be given in action for malicious prosecution, provided the plaintiff proves both malice and want of probable cause, the former of which is not necessarily to be inferred from the latter.

[24] Dye v. Denham, 54 Ga. 224.
[25] Dibble v. Morris, 26 Conn. 416.
[26] 11 Pa. 381.
[27] 21 Wend, 144.
[28] 30 Wis. 570.
[29] 46 Pa. 438.
[30] 4 Ind. 260.
[31] 2 Kan. 250.

To a like effect was the case of Cooper v. Utterback,[32] in which the court holds that if the prosecution originated without probable cause and in malice, the jury may well give exemplary damages; and further, that proof that the defendant acted under professional advice will not relieve him from such liability, unless he can show in addition that the advice was based on a full disclosure of all the facts known to the defendant; that he had used due diligence to ascertain all the material facts, in order to take the opinion of counsel upon them, and that he had acted throughout *bona fide* and without malice. In Zeigler v. Powell,[33] it was held that a complaint for malicious prosecution need not allege that the defendant "*falsely*," as well as "maliciously without probable cause" made the accusation. The three points to be established are malice, want of probable cause and the prosecution ended. When plaintiff has averred and proved these points, his right to a recovery is complete, and unless circumstances are proved extenuating the offense, exemplary damages will follow.

It is almost superfluous to say that corporations are liable for damages for malicious prosecution, provided the injury be done by their servants acting in the course of their business. It has even been held in a very recent case in Massachusetts (March, 1881) Reed v. House Savings Bank,[34] that institutions of that character are liable in damages for malicious prosecution.

Exemplary damages are given very certainly and very freely in cases of false imprisonment. Malice is the most indispensable ingredient in making up a case for such damages. It is so uniformly present in cases of illegal imprisonment that it is always hard to persuade a jury that an innocent man can be unlawfully put into jail by any mistake, however extraordinary. The sympathy of the jury is always strong in favor of a plaintiff who has been thus wronged, and in cases of this kind it is more likely to exceed than fall short of its duty, The case on this subject most frequently cited is that of Huckle v. Money,[35] in which for a few hours' detention, during which he was very civilly treated with

[32] 37 Md. 282.
[33] 54 Ind. 173.
[34] 12 Cent. L. J., 353.
[35] 2 Wils. 205.

"beefsteaks and beer," the plaintiff obtained a verdict for £300, which Lord Chief Justice Pratt gladly approved. That, however was in a time of high political excitement (1763), and the verdict of the jury in that and similar cases was a "property" of partisan political warfare,intended not only to intimidate the instruments of the party in power, but to express with emphasis the popular feeling on the issues of the day. In Voltz v. Blackmar,[36] which was an action for false imprisonment it was held, that wherever exemplary damages are claimed, the rule is, that all circumstances tending to show the motive of the defendant are admissible in evidence. The plaintiff may prove malice expressed or implied if he can, the defendant may show an honest belief in his justification by the circumstance under which he acted, or provocation, or sudden alarm or passion excited by the conduct of the plaintiff. In Hamlin v. Spalding,[37] the rule of arrest and of exemplary damages is laid down thus: if an officer or other person authorized to do so, make an arrest without good reason he is liable for actual damages; but if he makes it in bad faith, either with actual malice or to serve some ulterior purpose outside of the administration of justice, he is liable for exemplary damages. In Warwick v. Foulkes,[38] it was held that a plea that plaintiff had committed a felony, although abandoned on the trial was a persisting in the charge and might be taken into the account by the jury in estimating the damages, and in Marsh v. Smith,[39] the court says that there should, in prudence, be a strong conviction from the circumstances, that the party arrested was a felon, for if it should appear otherwise, "a jury can exercise a wide and liberal discretion as to the damages they will give the injured party."

It is almost superfluous to say that for injuries affecting the character and reputation of the plaintiff, such as slander and libel, exemplary damages are very usually given. In Fowler v. Chichester,[40] it was held, that in an action against husband and wife for slanderous words spoken of the plaintiff by the wife, exemplary damages may be allowed, and that for such damages the husband is responsible as at common law, that liability not having been removed by the Ohio legislature on the rights and liabilities of married women.

In the Detroit Daily Post v. McArthur,[41] exemplary damages were given for a liable on McArthur, the court holding that the amount of such damages depends upon the discretion of the jury, subject to proper cautions on the part of the court.

Harmon v. Harmon,[42] was an action for slander in which it was held that exemplary damages could be given for slander, that whether the slanderous words had been uttered within the limited period, was a question for the jury, and proof of facts that occurred before that period was admissible to prove malice.

A corporation being responsible for all the acts done by its agents in the course of its business, and their employment is responsible for a libel published by its agents in the course of their employment.[43] If the injury complained of be inflicted maliciously or wantonly, exemplary damages may be given. In Knight v. Foster,[44] it is held that where actual malice is shown exemplary damages may be given, and that under the general issue in an action for slander the defendant can not prove that the words spoken were but a repetition of common reports, either to rebut malice or mitigate damages. Exemplary damages may be given for slander of plaintiff's professional character (as a physician) and proof of the truth of the charge, *i. e.* that plaintiff was ignorant, and lost almost all his patients, was held to be inadmissible on the general issue to mitigate damages.[45] And to the same effect was Miller v. Roy,[46] In Coffin v. Coffin,[47] it was held that a defendant was liable for words spoken by him in a legislative body of which he was a member, unless such words were uttered by him in his official capacity, in which case he is not responsible, although the utterance may have been malicious. In Buckley v. Knapp,[48]

36 64 N. Y. 440.
37 27 Wis. 360.
38 12 Mees. & Wels. 507.
39 49 Ill. 396.
40 26 Ohio (State) 9.
41 16 Mich. 447.
42 61 Me. 233.
43 Philadelphia, etc. R. Co. v. Quigley, 62 U. S. 202.
44 39 N. H. 576.
45 Swift v. Dickerman, 31 Conn, 285
46 10 Lou. Ann. 231.
47 4 Mass. 1.
48 48 Mo. 152.

it was held that for libel, exemplary damages may be given, that having pleaded justification defendants can not give in evidence that they knew nothing of the libel until they saw it in their paper, it having been inserted by the reporter. Under the statute they might have alleged in their answer this fact, and other facts, in mitigation of damages, but not having alleged it they can not prove it. It was further held that it was competent to prove that defendants were wealthy[49] to enable the jury to act fairly and intelligently in assessing damages, the court very properly saying that "what would be a severe punishment to a very poor man, would be of no consequence to a rich one." In Louisiana, in the case of Fitzgerald v. Boulat,[50] the Supreme Court regulated the amount of damages in a very unusual fashion. It was a very remarkable action, being for slander, for assault and battery, for forcible entry into plaintiff's premises, malicious arrest, and for false imprisonment. For this aggregation of misdeeds the jury gave $2500 damages, and the Supreme Court thinking the amount excessive instead of ordering, a new trial reversed the judgment and ordered that the plaintiff recover $250.

Exemplary damages can not be given in an amicable action, in Arner v. Longstreth,[51] where the parties had agreed to try their respective rights to the property in dispute, it was held to be error to instruct the jury that they could give exemplary damages. Nor can a municipal corporation be required to pay damages if that character. It was so held in the case of Chicago v. Langlass,[52] which was followed by Chicago v. Jones,[53] and Chicago v. Kelly.[54] To the same effect is the case of Decatur v. Fisher,[55] in which the court says that such damages are not admissible, unless the injury is wilful which is scarcely possible.[56]

[49] On this point see Hosley v. Brooks, 20 Ill. 115; Humphreys v. Parker, 52 Me. 502: Lewis v. Chapman, 19 Barb. 252; Richards v. Booth, 4 Wis. 67; Bell v. Morrison, 27 Miss. 68; McAauley v. Berkhead, 13 Ired. 28; McConnell v. Hampton, 12 Johns. 235; Bump v. Betts, 23 Wend. 85.

[50] 13 La. Ann. 116.

[51] 10 Penn. 145.

[52] 52 Ill. 256.

[53] 66 Ill. 349.

[54] 69 Ill. 475.

[55] 53 Ill. 407.

[56] See also Chicago v. Martin, 49 Ill. 241; Barbour County v. Horn, 48 Ala. 566: Woodman v. Nottingham, 49 N. H. 387.

It has already been said that it is competent to prove with an eye to exemplary damages that defendant is wealthy,[57] it is equally true that defendant in mitigation of such damages may prove his poverty.[58]

As the power of the jury in assessing exemplary damages is so great and indefinite the limitation upon it placed by the court in Bryan v. Acee,[59] seems rather salutary; it was held in that case that where the damages laid in the declaration were very large, it was erroneous in the trial court to instruct the jury that if they found the facts to justify exemplary damages they were at liberty in their discretion to find any amount not exceeding that laid in the declaration. It might very possibly happen that after such an instruction a court might find it necessary to grant a new trial on the sole ground of excessive damages, and that would be at least a little awkward.

Damages should be given in one sum, not so much for compensation and so much for example or punishment.[60]

From a full consideration of the subject it will be seen that a very large proportion of the wrongs remediable by human justice, fall within the province of the jury, who only can exercise the prerogative of awarding exemplary damages. In doing so, they have a discretion analogous to the power originally exercised by the courts of equity in cases wherein the law, by reason of its universality, is inefficient. The extent and elasticity of its jurisdiction is eminently salutary, and the self-denial of courts, in abstaining from undue interference with its functions, is highly to be commended, as but for liability to punishment by exemplary damages, wrongs, otherwise irremediable, would be multiplied and go "unwhipt of justice."

WM. L. MURFREE, SR.

[57] See also Hayner v. Cowden, 27 Ohio 292; Belknap v. Boston, etc R. Co., 49 N. H. 358; Winn v. Feckham, 42 Wis. 493.

[58] Johnson v. Smith, 64 Me. 553.

[59] 27 Ga. 87.

[60] Bixby v. Dunlap, 56 N. H. 456.

REMOTENESS OF CONSEQUENTIAL DAMAGE—II.

In the recent case of McMahon v. Field (44 L. T. N. S. 175, 50 L. J. Q. B. 311) we find Hobbs v. L. & S. W. Ry, Co., followed by Fry, J., March 7, 1881), under the following circumstances: The plaintiff hired the defendant's stables, in order to put some horses there which he wished to dispose of at a fair held in the town. Soon after the horses arrived they were turned out of the stables, in consequence of the defendant having also let them to some other person, and, as he did not supply the plaintiff with other accommodation for the horses, the plaintiff was compelled to obtain it elsewhere. The plaintiff, alleging that the horses were injured, and that four of them caught cold by being thus suddenly turned out of the stables and exposed to the weather, while he was seeking other stables, claimed damages for the breach of contract; and the jury gave him £25 for the loss consequent on his not having the use of the stables, and £50 for the injury to the horses. After observing that the jury had not found whether the cold caught by the horses was the result of the defendant's conduct alone (not to be confounded with the question of remoteness of damage, which, we apprehend, is one of law to be decided by the court: Wilson v. The Newport Dock Co., L. R. 1 Ex. 189; Waller v. Ry., 4 L. R. Ir. 383; Brandon v. Gulf City Cotton Press Manufacturing Co., 8 Rep. 670; see Lehigh, etc, Ry. Co. v. McKeen, 90 Pa.; Hoag v. Ry. Co., 17 Alb. L. J. 186), Fry, J., said: "If there had been no decision on the point I should hold a person who breaks a contract must take the consequences of that breach, and the fact that something which coincides with the breach produces the result, does not relieve him from the consequences. But that does not appear to be the law. The case of Hobbs v. L. & S. W. Ry. Co., has been pressed upon me, and I am unable to find any distinction between that case and the present." But, he added, "I follow that case because it is an authority of the Court of Appeal, and not because it is to my mind a satisfactory decision."

Writing in the *Southern Law Review* (Nov. 1879), that able American jurist, Thompson, J., says, in reference to the Hobbs case: "It is true that the taking of a false step by the passenger, resulting in a broken limb, or the sustaining of a bodily injury by him from the overturning of a carriage, in attempting to continue his journey to his destination, are not consequences which could ordinarily be reasonably anticipated to follow from setting him off at the wrong station. But that a female passenger, when compelled to walk a distance of several miles, in the middle of a wet night, because no shelter nor conveyance could be obtained at the station to which she was wrongfully taken, might catch cold, is a consequence which, it would seem, could reasonably be anticipated to follow such a breach of the contract of carriage, and is such as may be taken to have been in the contemplation of the parties as fairly flowing from it. It must be in the contemplation of the parties that if, in the breach of the contract of carriage, the passenger is placed in such a position, or is surrounded by such circumstances that his health is endangered, either by reason of the nature of the exposure, or on account of his feebleness of body, his age, or his being unacclimated, sickness will probably ensue, causing damage to him." See Mobile, etc. R. Co. v. M'Arthur, and Williams v. Vanderbilt, previously cited; and Heirn v. M'Caughan, 32 Miss. 17, holding that the peculiar state of the plaintiff's health at the time of an exposure to the weather, caused by a common carrier wrongfully refusing to carry him, may be proved without being specially alleged; *et cf.*, as to warranty, false representation, and fraudulent concealment, Smith v. Green, 1 C. P. Div. 92, Mullet v. Mason, L. R. 1 C. P. 559, Ward v. Hobbs, 4 App. Cas. 26, Randall v. Newson, 2 Q. B. D. 102, and cases cited *infra*; and as to wrongful dismissal, see Breen v. Cooper, Ir. R. 3 C. L. 621. And commenting on the Hobbs Case, and the Barker Case (previously referred to), the *Albany Law Journal* remarks: "Railways are not provided for the conveyance of the healthy and robust alone. Sick and delicate people have a right to carriage, and are every day transported, as well as those who are strong and in health. It is not the fault of the passenger that he is sick or delicate, or is made sick by the exposure consequent upon the railway company's negligence. Especially is it not the fault of the woman that she is menstruating. Loss of business from such illness may not be recoverable; but why is not the illness the direct and easily-foreseen result of the negligent exposure? Suppose, for example, there is a railway collision and wreck, and the cars take fire and are consumed. All the passengers easily escape, except one, who is sick, or has a wooden leg, and perishes in the attempt. Here is an 'intervening, independent cause'—the sickness or the wooden leg. That was not the fault of the railway company. It 'appertained exclusively' to the passenger. But will any one deny the liability of the company? The law of the cases cited will bear revision."

The Pullman Palace Car Co. v. Barker, and Waller v. M. G. W. R. Co., certainly seem to go farther than Hobbs v. L. & S. W. Ry. Co., which itself went further than Indianapolis, etc. R. Co. v. Birney, in one respect, as already mentioned. Yet, we are not prepared to hold that they are not the logical outcome of the rule laid down in Hadley v. Baxendale, notwithstanding the suggestive remark of Fry, J. (a remark which is susceptible of a pointed bearing especially on Waller's case—not cited, of course), that in M'Mahon v. Field, there was "nothing to show that these horses were more susceptible to cold than other horses." "As to Hadley v. Baxendale, I was a party to it, and have no desire to depreciate it," said Martin B., in Wilson v. Newport Dock Co., L. R. 1 Ex. 185, "but in Boyd v. Fitt, 14 Ir. C.

L. R. 43, the Court of Exchequer in Ireland dissented from it, and approved of the views of the late Mr. Justice Crompton (Smeed v. Foord, 1 E. & E. 216, 28 L. J. Q. B. 183), and Sir James Wilde (Gee v. L. & Y. R. Co., 6 H. & N. 221, 30 L. J. Ex. 11), as being the sounder expositions of the law as to remoteness of damages." But Hadley v. Baxendale, though its *dicta* have been in various respects departed from (see note to Vicars v. Wilcocks, 2 Sm. L. C. 8th ed.; and 1 Sedgwick on Damages, 7th ed., 218), still remains the leading authority upon the general principle governing the assessment of consequential damages. That case, however, "is not applicable to, and does not decide every case. No rule, no formula could do that. Cases of damage differ as much as the leaves of a tree differ from each other, or rather the leaves of different trees. No two are exactly alike, and one description can not be applicable to all." Per Pollock, C. B., Wilson v. Newport Dock Co., *ubi supra*; and see Phillips v. L. & S. W. R. Co., 5 C. P. Div. 288; Irvine v. Mid. G. W. R. Co., 15 Ir. L. T. Dig. 18, 6 L. R. Ir. 55; Page v. Bucksport, 64 Me. 53. Much must depend upon the circumstances of each particular case, it is often said; but having regard to the results of the recent authorities here collated, we can not but lament that the courts do not seem to have always considered (with Barrow J., in Willey v. Belfast, 61 Me. 575), that "if it ever happens that logic and common sense can not be reconciled in the application of this doctrine to the decision of causes, logic must give way."

The differences, substantial though seemingly minute or refined, that may be detected by an acute mind between cases of this description, however apparently analogous, may be illustrated by comparing Woodger v. G. W. Ry. Co. (L. R. 2 C. P. 318) with Eyre v. Midland Great Western (of Ir.) Ry. Co. in which it was ingeniously and judiciously distinguished by Harrison, J. In Eyre's case, heard on the 18th ultimo— a case which we are the more particular to note here as any publicity it has yet had is of an inexact and misleading character—it appeared that the plaintiff, after coming from Clifden for the purpose, travelled by the defendants' line from Galway to Dublin on the 19th of January, but his portmanteau (which it was alleged had been given into the charge of a porter) was left behind at the Galway terminus. It was telegraphed for by the defendants, and was delivered to him on the night of the 20th. Meantime, in consequence of its detention he was obliged to remain at a hotel in Dublin, and had to purchase some trifling articles, such as a night-shirt, comb and brush, in place of those contained in the portmanteau. He had, moreover, come to Dublin *en route* for London, to which he should have proceeded on the 20th, if at all, but was prevented doing so by reason of the detention of his portmanteau; and so he returned to Galway. In the civil bill court he had been allowed £5 as damages, in respect of the costs of travelling to Dublin from Clifden and back, and his hotel expenses. On the hearing of the defendants' appeal from this decision, Byrne, for the plaintiff, referred to Bergheim v. G. E. Ry. Co. 3 C. P. D. 221, in reference to the delivery of the portmanteau to the railway porter and in reference to the damages. The Macdermot, Q. C. for the defendants, referred to Woodger v. G. W. Ry. Co. (*ubi supra*) where a commercial traveller was disallowed his hotel expenses during two days which he had been delayed by the non-arrival of his case of goods, sent by luggage train without any special intimation respecting it, the expenses not being the ordinary results of the detention, but special results arising from the fact that the plaintiff was on a journey to another place. Damages in respect of the trifling articles that had been replaced by the purchase of others were not pressed for; *cf.* British Columbia Saw Mill Co. v. Nettleship, L. R. 3 C. P. 499, 37 L. J. C. P. 235; Walton v. Fothergill, 7 C. & P. 394. Harrison, J. (rightly as we consider), held that the expenses of travelling to Dublin from Clifden and back were too remote, but that the plaintiff should be allowed £1 1s. for his hotel expenses during the period he was so detained in Dublin, Woodger's case being distinguished on the ground that here what had been detained was personal luggage necessary for the traveller and reasonably within the contemplation of the parties as a thing to be waited for. We may add on this subject, that where a carrier delays delivery, the reasonable expenses incurred in searching for the missing goods, such as for telegraphing, cab-hire, and messengers, may be recovered; Hales v. L. & N. W. Ry. Co. 4 B. & S. 66, 32 L. J. Q. B. 292; Morrison v. E. & N. A. Ry. Co., 2 Pugsley, 295.

For our own part, we can not but wish that the ordinary rule of the common law were more generally applied, that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed;" *per* Parke, B. Robinson v. Harman, 1 Ex. 855, 18 L. J. Ex. 202; *per* Fitzgerald, B., Irvine v. M. G. W. Ry. Co., 3 L. R. Ir. 55, 14 Ir. L. T Dig. 18; although we are, of course, coerced to concede that the limitations to which this rule has been subjected are now too firmly settled to be disputed. "It seems to me," said Fitzgerald, B., in Irvine's case, "that in applying the intention of placing the plaintiff in cases of contract in the same position as he would have been in if the contract had been performed, the law does not mean the same position relatively to all persons, matters and things whose relation to the plaintiff may even be directly affected by the breach of contract; it excludes the relations special to the individual complaining, and not common to him with other individuals of the class to

which he belongs, except in cases where such special relations can be fairly considered to have been regarded by both parties at the time and in the making of the contract. The rule in Hadley v. Baxendale seems to me a particular instance of this qualification, though somewhat differently expressed." But that rule, arbitrary yet on the whole not unreasonable, precludes redress for many undoubted wrongs, and is too often applied with improvident strictness, especially in reference to what is to be supposed to have been within the contemplation of the parties. "The damage must flow directly and naturally from the breach of contract, and they must be both certain in their nature and in respect to the cause from which they proceed," say the court in Leonard v. New York, etc. Telegraph Co. (41 N. Y. 544), and they "must be such as the parties may be fairly supposed to have contemplated when they made the contract"—or, as Fitzgibbon, L. J., put it in the Waller case, such as "ought to have been within the reasonable contemplation of both parties when making their contract as likely to arise from its breach." In principle what can be less challengeable—in practice what more oppressive. We have seen some illustrations of its harsh operation in the Hobbs, Barker, Waller, and M'Mahon cases. It was also laid down in Miner's Transportation Co. v. Associated Fireman's Insurance Co., 20 Amer. L. Reg. 201, and in First Nat. B'k of Barnesville v. West. Un. Telegraph Co., 30 Ohio Stat, 555, the facts of which latter case were as follows: A bank had written to a distant bank t o inqure as to the responsibility of a person who wished a draft cashed, asking an answer by telegraph, and stating that if none were received the draft would be cashed. An answer was sent by telegraph, but it was never received at the place where the bank was located. The draft was cashed, and proved to be worthless. It was claimed by the bank that if it had received the message when it ought to, the draft would not have been cashed. The message did not indicate the purpose for which it was sent. The court held that the bank could not recover the amount of the draft from the telegraph company. See other American cases cited in a paper in 6 *Southern Law Review*, 348, the learned writer of which observes: "It is said, and very persuasively, it would seem, that the agents of a telegraph company are bound to know that their dispatches are almost without exception important, and from the circumstances that this expensive means of communication is resorted to, pecuniary loss will result from delay or other neglect in transmission; that it would be idle to stand at the counter of a telegraph office and explain the details of a dispatch to the operator, even if he would listen. In Rittenhouse v. Independant Tel. Co. 44 N. York. 263, 265, Earl, C., said: 'If the defendant's agents did not understand the importance or import of the message, they could have inquired of the plaintiff; and hence for all the purposes of this action it must be treated as fully understanding the message, and the consequences which would result from its erroneous transmission.'" But, be this as it may, the general rule above stated prevails in such cases both in Canada. Kinghorn v. Montreal Tel. Co. 18 Up. Can. Q. B. 90; Stevenson v. Montreal Tel. Co. 16 Id. 530; Lane v. Montreal Tel. Co. 7 Id. C. P. 23, the United States, and this kingdom (while as a party who has the right to sue, there is a divergence of opinion, and see, as to the difference of the English and foreign law with respect to the liability of the sender, 11 Ir. L. T. 395). In Lowery v. Western Union Tel. Co. (60 N. Y. 198) a telegram asking for a certain sum of money was altered, by the defendants' negligence, so as to cover a larger amount, which was sent, and the receiver absconded; it was held that the defendants were liable as the negligence was not the proximate cause of the loss. But, indeed, to have held otherwise would have been as strange as to hold that if the bailee of a key carelessly allows it to fall into the possession of a man who commits a burglary, and by means of the key opens a box and abstracts its contents, the bailee would be liable (see Johnston's claim, L. R. 6 Ch. 218, 40 L. J. Ch. 288), yet not quite as strange as the actual decision in the English case of Ancaster v. Milling, already adverted to. A Canadian case, decided last year, may also be here mentioned. It appeared that one Cæsar, a postmaster, took from the mail matter in his charge, a letter containing several checques, and, having forged the endorsements, presented them to a bank where they were cashed upon Cæsar's giving an undertaking as to the genuineness of the endorsements. On a special case, as to the liability of the sureties of Cæsar on a bond, conditioned that the postmaster "should not commit any theft, larceny, robbery or embezzlment of, or lose or destroy, or commit any malfeasance, misfeasance or neglect of duty, from which may arise any theft, larceny, robbery, embezzlement, loss or destruction of any money, goods, chattels, valuables or effects, or of any letter or parcel containing the same," it was held that the bank, on whose behalf the Postmaster-General prosecuted this action, was entitled to nominal damages only for the larceny ot the letters; and could not recover for the loss occasioned by the payment of the cheques, as the forgery, and not the larceny, was the proximate cause of the damage so resulting; Postmaster-General v. M'Coll, 1 Can. L. T. 58.—*Irish Law Times.*

MORTGAGE — JUDGMENT—LIEN — PRIORITIES.

STOUT v. WALSH.

Supreme Court of the United States, October Term, 1880.

An incumbrance of the equity of redemption by a mortgagor, made pending proceedings to foreclose, must yield to an absolute decree of foreclosure, whether such incumbrance be created by way of mortgage or assignment, or suffered as a judgment.

Appeal from the Circuit Court of the United States, for the Northern District of Ohio.

Mr. Chief Justice WAITE delivered the opinion of the Court:

The facts disclosed by this record are as follow: On the tenth of November, 1873, Francis J. Lye executed to the First National Bank of Delphos a mortgage on certain real estate in the village of Delphos, Allen County, and within the Northern Judicial District of the United States in the State of Ohio, to secure his note to the bank for $6,000, dated November 1, 1873, and payable January 1, 1874. The note was given to take up, in part, an old note of Lye to the bank which was then past due, and the mortgage was duly recorded in the records of the county, November 10, at which time, under the laws of the State, it took effect. Rev. Stat. Ohio (1880), sec. 4,133. On the 29th of December, 1875, the present appellants, John W. and Jacob O. Stout, sued Lye and Philip Walsh, who were partners, in the Circuit Court of the United States for the Northern District of Ohio, to recover a judgment for $5,106.36 and interest. The first day of the January term, 1876, of that court, was January 4, and process was served on Lye and Walsh, in the suit of the Stouts, January 3. On the 15th of January, 1876, the bank commenced suit against Lye in the court of common pleas of Allen County to foreclose its mortgage. Process was served on Lye in that action, January 20. The Stouts were not made parties, the bank having then no actual notice of the pendency of their suit in the circuit court. On the the 31st of January, the Stouts recovered judgment in their action in the circuit court against Lye and Walsh for the full amount of their claim and costs, and on the same day caused an execution to be issued, which was, on the first day of February, duly levied on the lands covered by the bank mortgage. The effect of the judgment, without this levy, was to bind the lands of the defendant for the satisfaction thereof from the first day of the term of the court at which it was rendered, January 4. Rev. Stat. Ohio (1880), sec. 5,375. On the 23d of February, the Stouts commenced this suit in the Circuit Court of the United States for the Northern District of Ohio, making the bank a defendant, in which they sought to set aside the mortgage as illegal for want of authority to take it, or if that could not be done, to have certain alleged payments of usurious interest applied to reduce the debt. The bank was served with subpœna on the 25th of February, and was required to appear on the first Monday in April. The February term of the court of common pleas of Allen County began on the seventh of February, and on the seventh of March, during that term, a judgment was rendered in the suit of the bank against Lye for the full amount of his note and interest, and for a foreclosure of the mortgage by a sale of the mortgaged property. The bank answered the suit of the Stouts, setting up the foregoing facts, which, being proved by the agreed statement of the parties, the bill was dismissed. From that decree this appeal was taken.

The first question to be decided is whether the appellants are concluded by the judgment of the State court finding the amount due the bank and establishing the lien of its mortgage. If they are, they concede the decree below was right. There can not be a doubt that the State court had jurisdiction of the suit instituted by the bank, and, as was said by Mr. Justice Grier, speaking for the court in Peck v. Jenness, 7 How. 624, "it is a doctrine of law too long established to require the citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct, or otherwise, its judgment, till reversed, is regarded as binding on every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right can not be arrested or taken away by proceedings in another court." The mere fact, therefore, that the Stouts commenced this suit in the circuit court before judgment was rendered in the State court in favor of the bank, is of no importance. The point to be decided is, whether the judgment in the State court binds the Stouts, they not having been parties to the suit in which it was rendered. The rule is, that where suits between the same parties in relation to the same subject-matter are pending at the same time in different courts of concurrent jurisdiction, a judgment on the merits in one may be used as a bar to further proceedings in the others. It is also an elementary rule that "if, pending a suit by a mortgagee to foreclose the equity of redemption, the mortgagor makes a second mortgage, or assigns the equity of redemption, an absolute decree of foreclosure against the mortgagor will bind the second mortgagee or assignee of the equity of redemption." Mitford's Pl., p. 73; Story's Eq. Pl., sec. 351. Acting on this rule in Eyster v. Gaff, 91 U. S. 521, we held that an assignee in bankruptcy, appointed pending a foreclosure suit, was barred by a decree against the mortgagor. In this we may have gone somewhat beyond the rulings of the English courts, and of Chancellor Walworth in an anonymous case, 10 Paige, 20, but to our minds, under the late bankrupt law, an assignee stands as any other grantee of

the mortgagor would stand who acquired title after the suit to foreclose the mortgage was begun. That the suit of the bank was one to foreclose a mortgage, and that it was actually pending when the judgment lien of the Stouts was acquired, are conceded facts. When the suit was begun Lye the mortgagor, represented the entire equity of redemption. He had parted with no portion of it voluntarily, and if the Stouts had failed to get their judgment during the January term, 1876, of the circuit court, no one would claim they were not bound by the decree of foreclosure, although not parties to the suit. Neither could it with any propriety be claimed, we think, that they would not be bound if their lien had only taken effect from the date of their judgment. It is true the lien followed by operation of law from a judgment in an adversary proceeding against the mortgagor, and was not created directly by his own voluntary act, but it was the legitimate result of his failure to pay a debt he had incurred, and reached only the equity of redemption that was being foreclosed in the pending suit. It was in legal effect no more and no less than an incumbrance of the equity of redemption by the mortgagor, under the operation of the judicial proceedings which had been instituted against him to enforce the payment of a debt he owed. As this incumbrance was created *pendente lite*, there can be no question that it comes within the rule just stated as governing such transfers, unless the rights of the parties are changed because the lien, when created, bound the property from January 4, as against other liens and conveyances made by the mortgagor. The inquiry is not as to the extent or validity of the lien, but whether the holder is any less an incumbrancer *pendente lite*, because although his incumbrance was actually created while the suit was pending, it bound the land, for certain purposes, from an earlier date. Confessedly the lien of the bank, if its mortgage was valid, was in any event superior to that of the judgment. The only point in controversy is as to the necessity of making such an incumbrancer a party to a pending suit in order to cut off by a foreclosure his interest thus acquired in an equity of redemption. No doubt the Stouts, as soon as their judgment was got, had a lien on the mortgaged property, which for some purposes antedated the foreclosure suit, but until they had secured their lien they would not have been heard to contest the validity of the bank's mortgage, or the amount that was due on the mortgage debt. If they had been made parties when the suit was begun, they could have done nothing by way of defense to the action until they had acquired some specific interest in the mortgaged property. As creditors at large they were powerless in respect to the foreclosure proceedings, but when they got their judgment, not before, they were in a position to contest in all legitimate ways the validity and extent of the superior lien which the bank asserted on the property, in which, by the judgment they had acquired a specific interest. They might have appeared in the common pleas and asked to be admitted to defend the bank's suit, or for some other appropriate relief, or they might do, what they in fact did, commence this suit in the circuit court in aid of their execution. By this suit, however, they could not deprive the common pleas of the jurisdiction it had acquired in the bank's suit, nor take away from the bank its right to prosecute that suit to the end. The two suits were in fact pending at the same time in the two courts of concurrent jurisdiction in relation to the same subject-matter. The parties also were in legal effect the same, because in the State court the mortgagor represented all who, pending the suit, acquired any interest through him in the property about which the controversy arose. By electing to bring the separate suit the Stouts voluntarily took the risk of getting a decision in the circuit court before the State court settled the rights of the parties by a judgment in the suit which was pending there. Failing in this, they must submit to the same judgment that has already been rendered against their representative in the State court. That was a judgment on the merits of the identical matters now in question and concluded the "parties and those in privity with them, not only as to every matter which was offered to sustain or defeat the claim, but as to any other matter which might have been offered for that purpose." Cromwell v. County of Sac, 94 U. S. 352. It is true the mortgagor did not set up as a defense that the bank had no right to take the mortgage, or that he was entitled to certain credits because of payments of usurious interest, but he was at liberty to so do. Not having done so, he is now concluded as to all such defenses and so are his privies.

It follows that the decree must be affirmed; and it is so ordered.

MUNICIPAL BONDS — FEDERAL AND STATE COURTS — CONFLICT OF JURISDICTION.

STATE, EX REL. v. RAINEY.

Supreme Court of Missouri, April Term, 1881.

1. A judgment was obtained in the United States Circuit Court against Greene County on certain coupons of bonds issued by it, and a tax was levied by the county court to pay said judgment in obedience to a mandate of the United States Court, and in conformity with the laws of the State then in force, authorizing the county courts to levy taxes for the payment of county indebtedness. *Held*, in an action in the State courts by the collector against a merchant on his bond, to collect the amount of tax assessed against him to pay said judgment, that the tax could not be avoided on the ground that the bonds for the interest on which the judgment had been rendered were void, for that question was conclusively determined against the county in the judgment rendered in the United

States court, and will so remain unless reversed by some court having the power to review it.

2. A judgment against a county court, or its legal representatives, in a matter of general interest, as the levying and collecting of taxes, is binding, not only on the official representatives of the county named in the proceedings, but upon all of the citizens of the county, though not parties defendant by name.

Appeal from the Circuit Court of Greene County.

Thrasher & Young, for appellants; *Botsford & Williams*, for respondents.

NORTON, J., delivered the opinion of the court:

Wendel T. Davis, a citizen of Massachusetts, obtained judgment by default against Greene County in the Circuit Court of the United States, for the Western District of Missouri, in the year 1875, in the sum of $13,382.40, for overdue interest coupons issued by said Greene County in favor of the Hannibal, etc. R. Co., to aid in building the Kansas City and Memphis Branch of said road. To enforce this judgment the said United States Circuit Court issued a *maudamus* to the county court of Greene County, in obedience to which the said county court duly levied a tax of twenty cents on each one hundred dollars in value on all the taxable property in said county for the year 1878, which was duly extended on the tax books, which were delivered to the relator as collector of said county for collection. Defendant Rainey, a duly licensed merchant of said county, against whose goods, wares and merchandise a portion of said goods amounting to the sum of eleven dollars and forty cents had been levied refused to pay the same, and said tax remaining delinquent and unpaid relator as collector of said county instituted this suit in the circuit court of Greene County against defendant upon his bond as a merchant to recover the said tax. Defendants in their answer, set up substantially that the judgment for the payment of which the tax had been levied, was founded on interest coupons detached from certain bonds issued by the County Court of Green County to the Hannible & St. Joseph Railroad Company, and that the bonds and coupons were issued without authority of law and were utterly void, and that, therefore, the tax levied was void.

Upon the trial the circuit court rendered judgment for the plaintiff from which defendants have appealed, and the error assigned grows out of the action of the court in giving the following instructions viz. 1. That the judgment of the United States Circuit Court in favor of Wendel T. Davis and against Green County, is a final determination of the rights of the parties to that action, and is conclusive of every fact necessary to uphold it. 2. That the order of the county court of date of Feb. 6th, 1878 is a levy of taxes to pay a judgment of the United States Circuit Court for the Western District of Missouri regular upon its face, and not for the purpose of paying interest coupons on bonds of the county, and although it is admitted said judgment was rendered upon such coupons, the facts stated in the answer showing that the county was not liable thereon, came too late after final judgment and and can not be inquired into in this action. The giving of these instructions over defendant's objections, and the refusal to give instructions asked by them directly the opposite of those given, constitutes the error complained of. The fact that the Circuit Court of the United States had jurisdiction over the subject matter involved in the writ of Davis v. Greene County as well as of the parties thereto, is not seriously questioned by counsel, and if it were, its jurisdiction in such matters is established by the following authorities: Couler v. Mercer Co. 7 Wall. 121; Lyell v. Lapeer Co. 6 McLean, 450; McCoy v. Washington, 3 Wall. 381; Weil v. Green Co. 69 Mo. 281.

The jurisdiction of the Circuit Court of the United States being thus established both over the parties to the suit and the subject-matter of it, the judgment rendered therein is not subject to collateral attack, nor have we power to review it and say that the Federal court committed error in rendering it. This power is conferred alone upon some court having appellate jurisdiction from the judgment of the United States Circuit Court, and can only be exercised by such appellate tribunal when such judgment is brought before it for review, either by appeal, writ of error or *certiorari*. Bemicker v. Miller, 44 Mo. 111; Reed v. Vaughan, 15 Mo, 137; McCormack v. Sullivant, 10 Wheat. 192; Kennedy v. Bank, 8 How. 586; Voorhees v. Bank, 10 Pet. 449. The cause of action in the case of Davis v. Greene County was merged in the judgment, and the effect of the judgment was to establish conclusively against the county a debt which it was bound to pay, and the levy of the tax in question to pay it having been made in obedience to the mandate of the court rendering the judgment, and *in conformity with the laws of the State then in force authorizing county courts to levy taxes for the payment of* county indebtedness, the payment of such tax cannot be avoided on the grounds that the bonds for the interest on which the judgment was rendered were void, for that question was conclusively determined against the county in the judgment rendered, and will so remain until reversed or annulled by some court having the power to review it. State *ex rel.* v. Pacific R.R. 61 Mo. 155; 2 Dil. on Corp., sec. 351, p. 249; Supervisors v. U. S., 4 Wall. 435; Fugate v. Pitts, 41 Mo. 405; 98 U. S. 381; 9 Wallace, 413; 50 Ill. 505; 25 Ind. 486; 15 Wis, 122; 29 Iowa, 197.

It has been argued by counsel with much plausibility and ability, that plaintiff is not bound by the judgment rendered in the case of Davis v. Greene County on the judgment rendered in the *mandamus* proceedings to compel the county court to pay, because he was not a party *eo nomine* in either proceeding.

We have not been able to find, nor have we

been cited to any authority sustaining this position of counsel. On the contrary, all the authorities we have examined touching this point overthrow the position. In the case of Clark v. Wolfe, 29 Iowa, 197, the precise question was considered at length, and it was there held that a judgment against a county or its legal representatives, in a matter of general interest to all the people thereof, as one respecting the levying and collecting of a tax, is binding, not only on the official representatives of the county named in the proceedings as defendants, but upon all the citizens thereof, though not made parties defendant by name. This, we think, is so both on principle and authority; for, in suits of that character mentioned, the legally constituted representatives of the county stand in the place of each citizen of the county who is liable to be called on, as a tax-payer to contribute his proper proportion to liquidate the demand which a judgment may establish.

It has been ably and earnestly insisted that, as this court in the case of the State, *ex rel.* v. Garroute, 67 Mo. 445, held that the bonds from which the coupons on which the judgment in favor of Davis v. Greene County, was rendered, were void, that it therefore follows that we should disregard and hold for naught said judgment and all proceedings had under it, though such judgment was rendered, and such proceedings were ordered, by a court having full jurisdiction of the subject, and over whose judgment we have no appellate or revisory jurisdiction whatever. That a conflict exists between this and the Federal courts as to the validity of the bonds must be conceded. Such conflicts always bring up for determination questions of a delicate, important and embarrassing character, which when they arise, must be so treated as to preserve the integrity of each tribunal respectively, without any encroachments upon the jurisdiction of either, leaving the responsbility of such conflicting adjudications upon the shoulders of those who make them. Such a question was so treated by this court in the case of State, *ex rel.* v. Holladay, decided at October term, 1880. When there are two jurisdictions independent of each other having the right to pass upon such questions as are involved in this controversy, then conflicts will occur, and when they do occur neither jurisdiction should undertake to exercise appellate power over the other when none is provided. There is a mutual and reciprocal rule recognized by all the authorities that while the State courts may not interfere with the power of the Federal courts, neither shall the Federal courts interfere with those of the State. And while it may be safely affirmed that when the law making power has clothed a municipal corporation with the right to levy taxes to pay indebtedness contracted by it, a court possessed of jurisdiction to enforce the payments of such debts may, by *mandamus* in a proper case made, compel the authorities of such corporation to levy such tax in conformity with the mode prescribed, and to the extent of the power conferred by the law; it may, on the other hand, be also safely affirmed that the authorities of such corporation can only be compelled to proceed to levy a tax in cases where the legislature has conferred the authority on the corporation, either in express terms or by necessary implication. Neither the State nor Federal courts can invade the power belonging to the legislative department and confer such power; the only function which belongs to them is to compel the exercise of the power when conferred by the legislature, and where it is necessary that it should be exercised in order to the payment of a debt. If no such power has been conferred, the appeal in such case should be made to the legislature, and not to the courts. Merriwether v. Garrett, decided by United States Supreme Court [See 12 Cent. L. J. 19.]

This case is distinguished from the case of the State *ex rel*, Watkins v. Macon County Court, 68 Mo. 29, to which we have been cited as sustaining the position of the plaintiff's counsel. In that case, we refuse a writ of *mandamus* to compel the county court to levy a tax to pay a debt against the county established by a judgment because the law authorizing the creation of that particular debt, put an express limitation on the power of the county court to levy a tax to pay it, they being in terms clearly and unmistakably limited to the imposition of a tax not exceeding the one twentieth of one per cent in each year. This power had been exhausted by the court, and it having already levied the tax authorized, we refused the writ mainly upon the express ground that no power had been conferred on the court to levy a tax in excess of that prescribed by the law, and held that it was not the province of this court to compel the county court to exercise a power which the legislature had withheld and never conferred upon it. The act of the General Assembly approved March 28, 1879, entitled an act "concerning the assessment, levy and collection of taxes, and the disbursment thereof," to which our attention has been called, has no bearing on the question involved, inasmuch as the act, by its terms refers only to taxes thereafter to be "assessed, levied and collected," and not to such taxes as had been (as in this case) levied prior to the time the said act was passed, and which were in process of collection, we think the case was tried on the proper theory, and for the reasons herein given the instructions given by the court were properly given. Judgment affirmed in which all concur.

CONSTITUTIONAL LAW—REPEALS BY IMPLICATION — STATUTORY EXEMPTIONS FROM TAXATION.

HOME INS. CO. v. TAXING DISTRICT.

Supreme Court of Tennessee, April Term, 1880.

1. The provision of the Constitution of 1870 (art. 1, sec. 17) that "all acts which repeal, revive or amend

former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended," does not apply to acts which, by their positive provisions, operate a repeal of previous acts by necessary implication. (*Cf.* State *ex rel.* Uhl v. Gaines, *infra*, p. 592.)

2. Though a general law allowing a class of incorporated companies to pay a certain specified annual tax, "which shall be in lieu of all other taxes" will, while in force, protect such companies from the levy of additional taxes, it is still subject to repeal at the pleasure of the legislature.

3. The act of 1875, ch. 109, sec. 8, provided for the payment to the State of a prescribed tax by foreign insurance companies for the privilege of doing business in this State, "which shall be in lieu of all other taxes." By the act of 1879, ch. 84, sec. 7, sub-sec. 53, an additional tax for the benefit of the taxing district was laid on the same business. *Held*, that the latter act was valid and constitutional.

U. W. Miller, for complainant; *C. W. Heiskell*, for defendant.

COOPER, delivered the opinion of the court:

This is an agreed case to test the liability of foreign insurance companies doing business in the taxing district of Shelby County, to pay a privilege tax to the municipality.

The court below held them liable, and they have appealed.

By the act of 1879, ch. 84, sec. 7, sub-sec. 53, a tax for the benefit of the taxing district, of $200, payable quarterly in advance each year, is directly laid upon the privilege of opening or establishing an insurance office, or agency, for the insurance of fire, life or accident in the taxing district, for companies not chartered by the laws of the State of Tennessee." By the act of 1875, ch. 109, entitled an act to regulate the business of fire and all other except life insurance companies, it is provided by section 8, that every company organized for any of the purposes named in the act, not incorporated under the laws of the State, shall report semi-annually the premiums received or policies issued in this State, and, at the same time pay into the treasury of the State the sum of $2.50 upon each $100 of premiums so ascertained, "which shall be in lieu of all other taxes." The companies joining in this agreed case, fall within the provisions of the act of 1875, and have paid the tax as therein prescribed, and claim exemption from the subsequent taxation of the act of 1879, by reason of the limitation in the clause cited, which they insist is still in full force.

It has been held by this court, that a provision in the charter of an insurance company of this State for the payment to the State of a specific annual tax, "which shall be in lieu of all other taxes," will protect the company from further taxation by the State or any municipal corporation, Memphis v. Hernando Ins. Co., 6 Baxter, 527. It has also been held that the provision of the act of 1875, ch. 109. sec. 8, above quoted stipulating that the payment of the specified tax, "shall be in lieu of all other taxes," equally protected the companies from municipal taxation. Memphis v. Foreign Insurance Companies, MSS. opinion at Jackson. It was conceded, however, in the latter case, that this provision of the act, being only a privilege by law, not a contract by charter, could, of course, be repealed. The act of 1879 does, by the section cited above, undertake to levy an additional tax. The companies resist the collection of such tax upon the ground that the limitation protects them therefrom.

If the act of 1875 had simply provided for the payment of the specified tax to the State, omitting the words, "which shall be in lieu of all other taxes," the right of the legislature to levy the new tax would have been beyond doubt. For, in that event, the legislation would have been in the exercise of inherent power, not limited by contract, and the two acts might well stand together. It is equally clear that if our State Constitution contained no provision on the subject, the validity of the subsequent legislation would not be affected by the use in the previous act of the words, "which shall be in lieu of all other taxes." For, these words in a general law not creating a contract, the legislation might repeal them directly, or by implication. The Constitution of 1870, does, however, contain this clause in art. 1, sec. 17, "All acts which repeal, revive or amend former laws shall recite in their caption or otherwise, the title or substance of the law repealed, revived or amended."

The argument, on behalf of the companies, is that the act of 1879, to be operative in the levying of additional taxes on them, must be held to repeal the words, "which shall be in lieu of all other taxes," of the act of 1875; and is to that extent unconstitutional, because it neither recites in its caption, or otherwise, the title or substance of the law repealed.

The words relied on, as we have seen, do not amount to a contract, nor limit the power of subsequent legislature. They should be read as if the clause were written thus: "Which shall be in lieu of all other taxes until the legislature imposes other taxes;" for that is what, in legal effect, they mean. In this view nothing was repealed by the subsequent legislation, the clause in controversy being mere surplusage, and both acts remaining in full force.

If this construction be inadmissible, the second act is incompatible with the first, and does repeal it by necessary implication. The question in this view is squarely raised, whether implied repeals are within the purview of the constitutional provision. It has not, heretofore, been deliberately considered and determined by the court, although there have been expressions of opinion on the point, in cases in which its decision was, perhaps, not absolutely demanded. State, *ex rel.* Hamby v. Gaines, 1 Lea, 734; McGhee v. State, 2 Lea, 625; State, *ex rel.* Williams v. McConnell, 3 Lea, 332. The present case, although not absolutely requiring its solution, has been selected in connection with another case, in which the question

is directly raised for its discussion and determination. State, *ex rel.* Uhl v. Gaines, *infra*, p. 592. Strictly speaking, a new statute does not repeal an old statute, however inconsistent with it.

It is a mere form of expressing the result to say that the one repeals the other by implication. The prior act is not repealed, but rendered inoperative. And this is rendered obvious by the fact that a direct repeal of the later act, without any reference to the former, will, by a rule of the common law, give efficacy to the former. It was precisely because the old act never was repealed, that it thereby became operative. It is a convenient, though inaccurate use of language to say that the new law repeals the old, and that the repeal of the old law revives the new. More properly, the new act is an obstacle to the operation of the old act, which obstacle is removed by its repeal. It may well be doubted, therefore, whether a repeal by implication falls within the letter of the Constitution. It has usually been considered as if it did.

The question in this view is not one altogether of first impression. Several of the State Constitutions contain similar provisions, that is, provisions designed for the same general purpose, some of them couched in stronger language. A common provision in many of these Constitutions is thus worded: "No act shall ever be revised or amended by mere reference to its title, but the act revived, or section amended, shall be set forth or published at full length." Cooley Const. Lim. p. 151, n. 1. It has been uniformly held, says Judge Cooley (p. 152), that statutes which amend others by implication are not within these Constitutional provisions, and that it is not necessary that they even refer to the acts or sections which by implication they amend. He cites Spencer v. State, 5 Ind. 41; Branham v. Lange, 16 Ind. 497; People v. Mahaney, 13 Mich. 481; Lehman v. McBride, 15 Ohio, N. S. 593.

This conclusion has been reached partly from a consideration of the purpose for which the constitutional provision was adopted, and partly from the argument *ab inconvenienti*, that a contrary decision would render legislation well nigh impossible. The first of these reasons, every judge knows, is one which uniformly influences the judicial construction of statutes, where the meaning is at all doubtful. The evil intended to be remedied is a most potent factor in ascertaining the legislative will. It should have even greater weight in construing the work of a constitutional convention; for the language of a Constitution must necessarily be very general, admitting often of a broader sense than was meant to be conveyed. Error in the former case is, moreover, much less injurious, and more easily corrected than in the latter. And in either case, whenever the statute or constitutional provision undertakes to limit the power of the political department, every intendment should be in favor of that department. A doubt, as has often been said by the courts in relation to the great prerogative of legislation, should inure to the benefit of the government. The evil which led to the adoption of the constitutional provision under consideration was, undoubtedly, the passing of laws without the members of the legislature being fully advised of what they were doing. "The mischief designed to be remedied," says Judge Cooley, "was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty of making the necessary examination and comparison, failed to become apprised of the changes made in the laws." People v. Mahaney, 13 Mich. 497. The same is equally true of repealing statutes, which fail to call the attention of the legislature to the substance of the act repealed. The evil, it will be noticed, only applies to statutes which purport to repeal, revive or amend. No such evil can follow direct and positive legislation, which, precisely because it is positive, repeals by implication, previous legislation. For, in such case, the legislature, of course, know what they propose to pass into a law, and to intend that it shall be the law, whatever may have been previously enacted. "The very fact," says the Supreme Court of Maryland, "of establishing a particular rule of conduct for the public, presupposes an intention on the part of the legislature that a contrary rule to that which previously existed should prevail, and therefore the enactment of one law is as much a repeal of all inconsistent laws as if the inconsistent laws had been repealed by express words." Davis v. State, 7 Md. 151-159. Not the least possible danger can arise from a repeal by implication. For such a repeal is not favored nor admissible unless the positive provisions of the new law are utterly irreconcilable with the old law, thus unmistakably showing, to the satisfaction of the judiciary, that the repeal was intended.

On the other hand, the evils of a different construction of the constitutional provision are obvious and striking. It would result in turning what was intended to prevent unadvised legislation into a barrier to all legislation, and a certain snare to the legislator. "It would render," says the Supreme Court of Maryland, "many wholesome laws wholly inoperative, because of the inability or neglect of members to search thoroughly the statute books for laws, which might be inconsistent or repugnant, a work, in many cases, of so great difficulty as to amount almost to an impossibility." 7 Md. 159.

The difficulty of determining the effect of a new statute of a general nature on the pre-existing system is notoriously great. Time alone, and the practical application of the new law, to the varying phases of actual cases, can show the ultimate results. To require from our legislators in advance what the wisest lawyer or judge would find impossible upon serious study, would, indeed, go far to render legislation impossible. Nor would this be the greatest evil. It would often happen, after a new statute had been acted on and treated

as valid for years, some old statutory provision might be discovered, which would annul it *ab initio*.

That the constitutional provision under consideration does not apply to repeals by implication seems to be sustained by reason, as it certainly is by authority.

The chancellor's decree must be affirmed with costs.

CONSTITUTIONAL LAW—REPEALS BY IMPLICATION — CLERK'S FEES ON TAX SALES.

STATE *EX REL.* UHL, CLERK v. GAINES.

Supreme Court of Tennessee, April Term, 1880.

1. The provisions of the Constitution of 1870 (art. 1, sec. 17) that "all acts which repeal, revive or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended," does not apply to acts which, by their positive provisions, operate a repeal of previous acts by necessary implication. (*Cf.* Home Ins. Co. v. Taxing District, *supra*, p. 590.)

2. Under the act of 1879, ch. 245, sec. 5, the clerk can collect from the State his fees for entering judgment on tax sales, only in cases where the land had not been previously sold to the State for taxes, or if so sold, had been redeemed before the later sale.

3. A sale of land for taxes is improper, where the same land has been previously sold for taxes, and has been purchased by the State and remains unredeemed.

C. W. Heiskell for relator; *Ben. J. Lea*, for respondent.

McFARLAND, J., delivered the opinion of the court.

This is a proceeding by *mandamus* to compel the Comptroller Gaines to issue his warrant for the amount claimed by the relator Uhl for services rendered by him as clerk of the Circuit Court of Shelby County in relation to the sale of lands bought in for the use of the State for taxes.

The relator claims the fees allowed by the 79th section of the act of 1873, ch. cxviii; that is to say, one dollar for each separate tract, lot or parcel of land sold. On the other hand, it is claimed that the above section is repealed or modified by the 5th section of the act of 1879, chapter 245. It is argued that the latter act does not operate to repeal the former, because it does not comply with sec. 17, of art. 2, of the Constitution, as follows: "All laws which repeal, revive or amend former laws, shall recite in their caption or otherwise, the substance of the law repealed, revived or amended." This question has been determined at the present term in the case of the Home Insurance Co. v. The Taxing District,* the majority of the court holding that the above clause does not apply so as to render void, acts merely inconsistent with former acts not thereby expressly repealed; or, in other words, does not prevent repeals by implication. It remains, then, to determine the meaning of the 5th section of the act of 1879. It is in these words: "That the clerk of the court be allowed the sum of one dollar for each tract or lot of land in the trustees' report, for docketing the same, which shall in no case be paid by the State or county, but the clerk may collect the same of the delinquent tax-payer; *provided*, the State has never before paid on any of said tracts or lots of land, unless the same has been redeemed by the State and sold again." This language is certainly obscure, but we are required to give it a meaning, if we can do so consistently with a fair interpretation of the words used. To follow the most literal construction of this language, it would mean that the fees are in no event to be paid by the State or county; but the clerk may collect them from the delinquent tax-payer in all cases, except where the lands had been previously bought in by the State, and the State had paid the fees, and the land had not been redeemed; and in these cases the clerk would not even have the right to collect the fees of the delinquent taxpayer. But this construction would be utterly inconsistent with other well defined provisions of the law.

The trustee is required to include in his report of delinquents, not only the amount of the taxes, but also the *costs*, including the fees of the clerk. This is repeated in a section immediately following the one in question, and the lands are to be sold for the taxes, penalties and *costs*, and if no one else will bid the amount, they are to be bid off for the use of the State and county at the amount of said taxes, penalties and costs. If redeemed by the owner, he is to include in his redemption money, all the costs. We can not suppose that the legislature meant in such cases, to deprive the clerk of all costs, or to leave him to collect the same from the delinquent. He could have no just right to collect from the delinquent, because the State having purchased for the taxes and costs—the costs are satisfied so far as the delinquent is concerned. To require him to pay the costs to the clerk, and then pay again to the State upon redemption, would be unjust; besides in all such cases there is no means of collecting from the delinquent, and it is for this very reason the lands are sold, and such a provision would virtually deprive the clerk of all compensation,

We can not, with a proper respect for the legislature, conclude that it was intended to require the clerk to render the services, and yet deprive him of all compensation in all these cases, where the lands are bought in for the use of the State and county. If the lands are redeemed the State will receive the amount of the clerk's fee in redemption; if not redeemed the State will own the land; and in neither event is there any mode for the clerk to collect his fees. Of course when

* *Supra*, p. 590.

the land is purchased by any one else the clerk receives his fees out of the sum paid.

We conclude, therefore, that the legislature could not have intended that the State is in no event to pay the clerk's fees. The only reasonable meaning that can be given to the section is, that the State is not to pay the fees in these cases where the lands have been previously bought in by the State, and not redeemed at the time of the second sale, but in such cases the clerk may collect the fees from the delinquent. This is to make the clerks lose their fees in cases where the lands are improperly sold the second time, unless they collect from the delinquents. We admit that it requires a liberal transposition of the language of the section, to arrive at this conclusion, but it is either this, or declare the act without meaning and void.

It is argued in behalf of the relator, that the section may be construed to mean that the clerk is to have $1.00 for docketing the report, and hence it is not in conflict with the act of 1873. We find, however, that no additional duties are required of the clerk, and the words, "docketing the same," no doubt mean entering the report of record, the same duties previously required, and the fee is the same previously allowed, and not in addition.

The record shows the fees to which the clerk is entitled upon the basis indicated is $1174.00; and for this sum, instead of $3271.00 as determined by the circuit judge, the relator is entitled to a warrant. The judgment will be reversed and modified accordingly.

PRIORITY OF LIENS—JUDGMENT—MORTGAGE FOR FUTURE ADVANCES.

ACKERMAN v. HUNSICKER.

New York Court of Appeals.

Where a mortgage is made to secure future advances, and the mortgagee has no actual notice of judgments that are rendered against the mortgagor before the advances are made, such mortgage will have priority over the judgments.

Cornelius E. Stephens, for the plaintiff; *George Burrows*, for the defendant.

ANDREWS, J., delivered the opinion of the court:

The mortgage from Levi to the plaintiff was given to secure the mortgagee for any indorsements he had made, or should thereafter make, for the mortgagor, or the firm of Levi & Miller, to the amount of $6,000. It was dated May, 2, 1874, and was recorded May 3, 1874. The first indorsement was made May 7, 1874, and the last October 16, 1874. The plaintiff has been compelled to pay the indorsed paper, and has advanced for that purpose the sum of nearly $5,000 over and above all payments made by the mortgagor. This action is brought to foreclose the mortgage, and the only controversy relates to the priority of lien as between the mortgagee and judgment-creditors of the mortgagor, whose judgments were obtained subsequent to the mortgage, but prior to the indorsement by the plaintiff of some of the notes paid by him, which enter into and form part of the mortgage debt.

The question is, whether the mortgage is a paramount lien to the judgments, as to that part of the mortgage debt arising out of indorsements made after the judgments were docketed. It is not claimed that the plaintiff had actual notice of the judgments when he indorsed the paper, and it is found by the referee that he never had personal notice or knowledge, or any notice, of their existence until after all the indorsements had been made. The judgments were docketed in the county where the mortgaged premises were situated. If the docketing of the judgments was constructive notice to the plaintiff of their existence, then he had notice of the judgments; otherwise he had none.

There is no question as to the validity of mortgages to secure future advances or liabilities. They have become a recognized form of security. Their frequent use has grown out of the necessities of trade and their convenience in the transaction of business. They enable parties to provide for continuous dealings, the nature or extent of which may not be known or anticipated at the time, and they avoid the expense and inconvenience of executing a new security for each new transaction. It is well known that such mortgages are constantly taken by banks and bankers as security for final balances, and banking facilities are extended and daily credits given in the commercial community in reliance upon them. Mortgages for future advances have sometimes been regarded with jealousy, but their validity is now fully recognized and established. Bank of Utica v. Finch, 3 Barb. Ch. 294; Truscott v. King, 6 N. Y. 147; Robinson v. Williams, 22 N. Y. 380; Shirras v. Caig, 7 Cranch, 34; Lawrence v. Tucker, 23 How. (U. S.) 14; Leeds v. Cameron, 3 Sum. 492.

There can be no doubt, therefore, that the mortgage in this case, as between the parties to it, is a valid security for the plaintiff's debt. It is equally clear that to prefer an intervening incumbrance over the claim of the plaintiff, would violate the understanding of the parties to the mortgage at the time it was executed, for the plain inference was that the interest of the mortgagor in the land, as it existed when the mortgage was given, should be bound as security for all liabilities which the plaintiff might incur as indorser upon the faith of the mortgage. It could not have been intended that the plaintiff should be deprived of any part of the security of the mortgage for any part of the indorsed paper. It would have been a clear breach of duty on the part of the mortgagor if he had, without notice

to the mortgagee, voluntarily incumbered the land by liens having priority of the mortgage, and then applied to the plaintiff for and procured further indorsements. If the judgments have a preference over the plaintiff's mortgage, as to indorsements made after the judgments were docketed, it must result from some superior equity of the judgment creditors, or from the effect of docketing the judgments, as constructive notice to the plaintiff of their existence. The authorities are clear to the point that upon general principles of equity no such preference can be claimed. In Gordon v. Graham, 2 Eq. Cas. Abr. 590, Lord Chancellor Cowper is reported to have held that a first mortgagee with a mortgage covering future advances has priority, not only for what may be due to him at the time of a second mortgage, but also for advances made by him after notice of the second mortgage. This case was doubted in England as to the point reported to have been decided, that the first mortgagee was entitled to a preference for advances made after notice of the second mortgage, and in Hopkinson v. Rolt, 9 H. L. Cas. 514, this doctrine was overruled; but the court distinctly recognized and affirmed the doctrine that the first mortgagee was protected as to advances made after the second mortgage without notice. The case of Shirras v. Caig, 7 Cranch, 34, is a leading case in this country upon this point. The mortgage in that case was executed to secure existing debts and future advances. The mortgagors subsequently conveyed the equity of redemption to the defendants, who were *bona fide* purchasers, and had no notice of the plaintiff's mortgage; and one of the questions was whether the mortgagees, who had made advances to the mortgagors on the faith of the mortgage after they had conveyed to the defendants, but without notice of their title, could enforce the mortgage for such advances, and it was held that they could, Marshall, C. J., saying that the mortgage stood as security for "the payment of debts still remaining due to them, which were either due at the date of the mortgage, or were afterwards contracted upon its faith, either by advances actually made or incurred prior to the receipt of actual notice of the subsequent title of the defendants." The effect of the registry laws was not involved, and the case was decided upon the general equities. The advances in Shirras v. Caig were optional; that is, the mortgagees were not bound to make them; and the same is true of the advances in Gordon v. Graham, *supra*. Shirras v. Caig has been frequently cited with approval by the courts in this State, and its authority, so far as I know, has not been questioned. Brinkerhoff v. Marvin, 5 Johns. Ch. 320; Griffin v. Burtnett, 4 Ed. Ch. 673; Truscott v. King, *supra;* Robinson v. Williams, 22 N. Y. 380.

It must, I think, be conceded that independently of the registry laws, according to general principles of equity, the lien of the plaintiff's mortgage is superior to the lien of the judgments, as well for indorsements made prior to their rendition as for those subsequently made without notice. It remains to consider whether, under the statutory system for the registry of liens, the docketing of the judgments was constructive notice to the plaintiff. If the docketing of the judgments was constructive notice to him of their existence, then, unquestionably, the judgments have preference to the plaintiff's mortgage as to all advances subsequently made.

The general principle of construction of the registry laws upon the point of notice is that the registration of incumbrance is notice to subsequent incumbrances only. They are prospective and not retrospective in their operation. Stuyvesant v. Hall, 2 Barb. Ch. 151; King v. McVickar, 3 Sandf. Ch. 192; Howard Ins. Co. v. Halsey, 8 N. Y. 271. The plaintiff's mortgage was first made and first recorded, and regarding these facts only, the mortgage was the prior lien.

It is claimed, however, that the mortgage did not become an actual lien or incumbrance until the indorsements were made, and that as to each indorsement it became in effect a new mortgage as of the time when the indorsements were made, and that the plaintiff must therefore be decided to have had notice of the judgments when the subsequent indorsements were made. It is manifestly true that the mortgage did not become an actual charge on the land so as to be enforceable by the plaintiff, until he had incurred liability as indorser. But the plaintiff's mortgage was an instrument capable of being recorded under the statute before any liability had been incurred. It is the general practice to record mortgages and docket judgments taken to secure future advances and contemplated liabilities, before an actual indebtedness arises. On being recorded, the record is notice to subsequent purchasers and incumbrancers, and they are put upon inquiry and have the means of ascertaining to what extent advances had been made, and by notice to prevent further advances to their prejudice. In Truscott v. King, 6 N. Y. 147, judgment had been entered on a bond and warrant of attorney for $20,000, to secure existing and future liabilities, and Jewett, J., said there could be no doubt that the judgment in its inception was a valid security upon the land to the full amount, whether a debt only in whole or part then existed, it was agreed at the time that it should be given as an indemnity for advances thereafter to be made, or such advances were thereafter made. In Robinson v. Williams, 22 N. Y. 386, a mortgage had been executed to secure future liabilities of the mortgagor to the Hollister Bank, on paper which might be discounted by the bank for the mortgagor. The mortgage was recorded on the day it was executed, and before any liabilities had been incurred. Davis, J., in giving the opinion of the court, said: "The recording of the mortgage was notice that the Hollister Bank had a mortgage on the premises for the purposes therein specified."

It does not, I think, aid the argument of the

counsel for the judgment creditors to show that the plaintiff had no claim on the land for the indorsements in question until after the docketing of the judgments, or that by our law a mortgage is a mere lien or security, and not a title. The question is: Was the mortgage, when executed, a conveyance within the recording act? I think it was, and if so, then the plaintiff was entitled to put it upon record. It was a potential lien for its full amount, of which subsequent purchasers or incumbrancers had notice. They were informed by the record of the existence of a bond containing the condition upon which the mortgage was given, and through that of the agreement between the parties, that the interest of the mortgagor in the land, as it existed at the date of the mortgage, was pledged for any indorsements which the plaintiff might make up to the limit fixed; for this, as we have said, was the plain reading of the transaction.

It would be inequitable to permit third persons to deal with the mortgagee in respect to the land to the prejudice of the plaintiff's security, without notice to him, or to allow a subsequent purchaser or incumbrancer, having notice by the record, to acquire a preference over the mortgage for indorsements made upon the faith of the mortgage after the second incumbrance, in ignorance of the intervening lien or title.

The question presented in this case has not been decided in this State by the court of last resort. In Brinkerhoff v. Marvin, 5 John. Ch. 320, the chancellor, after referring to the observation of the court in Livingston v. McInlay, 16 John. 165, that if it was a part of the original agreement, a judgment might be entered as a security for further advances beyond the amount then actually due, in like manner as a mortgage may be held as a security for future advances, said: "The limitation to this doctrine, I should think, would be, that when a subsequent judgment or mortgage intervened, further advances after that period could not be covered." The remark of the chancellor has been repeated in subsequent cases. Lansing v. Woodworth, 1 Sandf. Ch. 43; Barry v. Mexican Express Co., Id. 280; Goodhue v. Berrien, 2 Id. 630. What was said by the chancellor in Brinkerhoff v. Marvin, was unnecessary to the decision of the case, but with the qualification that the first incumbrancer had notice of the intervening right when the subsequent advances were made, the observation is not open to controversy. Neither in that or any of the subsequent cases referred to, was it material to decide whether the record of the subsequent incumbrance was notice to the party holding the prior lien, and in none of them was this question considered.

In Craig v. Tappen, 2 Sandf. Ch. 78, it does not appear whether the first mortgagee had notice of the second mortgage when the subsequent advances were made. He knew that the second mortgage was to be given, and the inference that he knew of its existence when the advances were made is not an unreasonable one. In Truscott v. King, 6 Barb. 346, the Supreme Court expressly decided the point involved in this case in accordance with the view I have expressed. The judgment of the General Term was reviewed on another point in this court, but one of the judges, who wrote an opinion of reversal, expressed his concurrence in the views expressed by Judge Parker in the court below upon the point now in controversy (see opinion of Edwards, J., 6 N. Y., 166). The adjudications in the courts of other States upon the question are conflicting. It would not be profitable to refer to them at length. They will be found cited in Jones on Mortgages, section 364, *et seq.*

The doctrine that a party who takes a mortgage to secure further optional advances, upon recording his mortgage, is protected against intervening liens for advances, made upon the faith and within the limits of the security, until he has notice of such intervening lien, and that the recording of the subsequent lien is not constructive notice to him, has, we think, been generally accepted as the law of the State, at least since the decision in Truscott v. King. It would not be wise, under the circumstances, now to adopt the opposite view, even though we should regard it as better supported by reason. It seems to us, however, that the doctrine which we have affirmed in this case is most consistent with equity, and establishes a rule reasonable and easy of application. The opposite rule imposes the burden of notice and vigilance upon the wrong person.

The party taking the subsequent security may protect himself by notice, and as is said by Mr. Jarnien in his notes to Bytherwood's Conveyancing: "No person ought to accept a security subject toa mortgage authorizing future advances without treating it as an actual advancement to that extent."

These views lead to a reversal of the order of the General Term, and an affirmance of the judgment entered upon the report of the referee.

All concur.

MISNOMER—CONTRACT— PUBLIC POLICY —STATE CONTROL OF PATENTED PROPERTY.

STATE OF OHIO, *EX REL.* v. BELL TELEPHONE CO.

Supreme Court of Ohio, December 21, 1880.

1. Where a corporation whose name is composed of several words is sued by name in which a word in the corporate name is omitted, such omission, or misnomer, unless pleaded in abatement, will be disregarded by the court.

2. By the provisions of chapter 4, title 2, of the Revised Statutes, each company operating a line or system of telephones in this State, is required to receive

dispatches from and for telegraph, and other companies, without discrimination.

3. A contract between a telephone company and the owner of telephone instruments, to the effect that, in the use of such instruments by the company, discriminations shall be made as between telegraph companies, is void as against public policy, as declared by the statute.

4. The use of patented property, like other species of property, when devoted to public use, is subject to control by State legislature, where the exigencies of the public welfare require it.

Mandamus.

The American Union Telegraph Company, a corporation of the State of New York, is engaged in doing a general telegraph business in the State of Ohio and elsewhere, with an office in the City of Columbus, Ohio. The Baltimore & Ohio Railroad Company, a corporation of the State of Maryland, is engaged in doing a general railroad business in the State of Ohio and elsewhere, with an office in said city. In the management of its business, the railroad company has organized a telegraph department to facilitate the management of its trains and the general conduct of its business, and also an express department, to which is confided the carrying of packages of valuable goods, money, etc. The office in which the management of these departments is controlled, is in the same building with the office of the telegraph company, and by an arrangement between the relators, the telegraph department of the railroad company is placed under the management of the telegraph company.

The Columbus Telephone Company, one of the respondents, is a corporation of this State, organized on the 15th day of April, 1880, and is engaged in conducting and managing a system of electric speaking telephones in said City of Columbus, with an exchange or central office in the city. The Western Union Telegraph Company, also a respondent herein, is a corporation of the State of New York, engaged in a general telegraph business in the State of Ohio, and elsewhere, having an office in said city. The telephone instruments used by the Columbus Telephone Company and its patrons or customers, are the property of The American Bell Telephone Company, a corporation of the State of Massachusetts, which company is also the owner, by assignment, of letters patent on said instruments. This corporation is also a respondent in this action under the name of "The Bell Telephone Company."

The right of the Columbus Telephone Company to use the instruments and patented invention of The American Bell Telephone Company, is held under an agreement in writing, made the 10th day of April, A. D., 1880, by and between the American Bell Telephone Company, lessor, and the Columbus Telephone Company, lessee. Under which agreement the American Bell Telephone Company reserved, or attempted to reserve, the right to control all telegraphic messages to be collected or distributed through the system and exchange of the Columbus Telephone Company, said American Bell Telephone Company contracted with the Western Union Telegraph Company to give the latter company the exclusive right to use said telephone system and exchange for the purpose of collecting and distributing telegraphic messages; and, the relators being desirous to avail themselves of the advantages and facilities afforded by said telephone system, applied to and requested said Columbus Telephone Company to place one or more telephone instruments in their office, to be used in the conduct and management of the business of said relators. The complaint of relators is thus stated in their petition for an alternative writ of *mandamus* which has been heretofore allowed: "The said relators also offered to pay therefore the usual price paid for the use of such wires and telephones, and have been ready ever since, and are now ready to make such payment, and to, in all respects, comply with the rules and regulations established by said defendants for the control and management of said telephone exchange, and they are now ready to comply therewith, and said defendants offered to place in said office the necessary wires and a telephone for the use of said express department of said railroad company, but prohibited its use by said telegraph department and said telegraph company, and refused to place therein a telephone and wires to be used by or for the use of said telegraph company or telegraph department, giving as the reason therefor, that under the contract between said defendants, the said Western Union Telegraph Company was to have the use of said telephone exchange to the exclusion of all other telegraph companies, and that all messages sent or received over said telephone wires, were to be sent and received for the exclusive use and benefit of said Western Union Telegraph Company, thus discriminating in favor of the last named company, and against all other telegraph companies, especially said American Union Telegraph Company, and unjustly refusing the latter company the use of said said wires. The relators say that such exclusive use of said telephone wires is an unjust discrimination against them, and a violation of the duty of said defendants, and of their obligation to serve the public indiscriminately, and they are without remedy other than the writ of *mandamus* commanding said defendants to allow said relators the use of said telephone exchange and wires, and to connect said offices of said relators therewith, and which writ the said relators now pray may be allowed and issued in accordance with the statute in such case made and provided."

The alternative writ commanded the respondents to put up and maintain a telephone as prayed for by relators, or to show cause for the omission to do so. Having omitted to do so as commanded by the writ, the Columbus Telephone Company and the Western Union Telegraph Company show cause, by alleging their contract and agreement

with the American Bell Telephone Company as above set forth, the latter company being in default.

The cause is now submitted on a motion for a peremptory writ.

J. H. Collins, for relator; *Mathews, Ramsey & Mathews*, for respondents.

McILVAINE, C. J., delivered the opinion of the court:

It has been suggested that jurisdiction has not been obtained over the American Bell Telephone Company. There is no doubt that the relators intended to prosecute the American Bell Telephone Company, but, through ignorance of the true name, have designated it by the name of the "Bell Telephone Company." The misnomer, however, is not fatal to the jurisdiction. It is shown that service of the writ was, in fact, made upon the proper agent of "The American Bell Telephone Company." It is true, advantage of the mistake might have been taken by plea in abatement, but as the company, by its silence, has shown itself to be content with the name by which it has been sued, the court will regard the objection that otherwise might have been made on the ground of misnomer, to have been waived. 2 Estee's Pleadings, 449, note; 2 Cowen, 770; 1 Den. 451; Kyd on Cor. 237; Green's Brice's Ultra Vires, 3, note; 13 Johnson, 58; 1 Potter's Cor. sec. 12.

Whether any such duty, upon the principles of the common law, is owing from respondents or either of them, to the relators as members of the general public, as is claimed by them, growing out of the nature of the business in which respondents are engaged and their relations to the public generally, we need not stop to inquire, as, in our opinion, the whole question between the parties may be determined by the provisions of the statute, in such case made and provided. Title 2, chapter 4, of the Revised Statutes of Ohio, from section 3454 to section 3470, prescribes the powers and duties of magnetic telegraph companies, and section 3471 of the same chapter provides: "The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

Among the powers conferred upon magnetic telegraph companies is the right to occupy public roads and other public grounds, and the power of eminent domain, and among their duties are the following, as prescribed in section 3462, as amended April 15, 1880, namely: "Every company, incorporated or unincorporated, operating a telegraph line in this State, shall receive dispatches from and for other telegraph lines, and from and for any individual; and on payment of its usual charges for transmitting dispatches, as established by the rules and regulations of the company, shall transmit the same with impartiality and good faith, under a penalty of $100 for each case of neglect, or refusal to do so, to be recovered, with costs of suit, by civil action, in the name and for the benefit of the person or company sending or forwarding, or desiring to send or forward the dispatch."

This section, when construed in connection with section 3471, above quoted, makes it the duty of the Columbus Telephone Company to receive dispatches from and for telegraph lines by the very words of the statute; but if not, such duty towards the relators and each of them is embraced in the succeeding clause: "And from or for any individual." The word "individual" is here used in the sense of person, and embraces artificial or corporate persons, as well as natural. The dispatches so received "from or for" must be transmitted "with impartiality," that is, without discrimination either in respect to persons or in the time or manner of transmission.

Such being the nature of the duty imposed upon the Columbus Telephone Company by the statute, it can not shield itself from the performance thereof by any self-imposed restrictions contained in the stipulations of a contract with the American Bell Telephone Company, by which the right to use the instrument or license of the latter company was acquired. The Columbus Telephone Company was bound to acquire from the American Bell Telephone Company such rights in its instruments and patents (or to provide itself by other means of all such facilities) as were necessary to discharge its duties to the public as prescribed in the statute; otherwise, it had no right to engage in the business of operating a system of telephone at all.

We do not mean to say that, as between the Columbus Telephone Company and the American Bell Telephone Company, the right to control the receipt and delivery of telegraph messages might not have been reserved to the latter company; but we do hold that no such right could be reserved whereby the relators could be deprived of the use of the system of telephones organized and managed by these telephone companies, either jointly or severally.

And in regard to the American Bell Telephone Company, it is enough to say, after what has already been said in relation to the Columbus Telephone Company, that it cannot be permitted to operate a line or system of telephones, in this State, and in the face of the statute, either directly or through the agency of licensees, without impartiality, or, in other words, with discriminations against any member of the general public who is ready and willing to comply with the conditions imposed upon all other patrons and customers, who are in like circumstances. And all contracts in contravention of the public policy of this State, as declared in chapter 4 of the Revised Statutes, above referred to, must be declared void and of no effect.

It is claimed that the statute above referred to cannot control or invalidate the contract in question; because the exclusive right to make, vend

and use these telephone instruments is vested, by the assignment of letters patent, under an act of Congress, in the American Bell Telephone Company; and that it is not within the power of a State to impair the right so secured. In our opinion this statute is not the subject of constitutional infirmity.

While it is true that letters patent secure a monopoly in the thing patented, so that the right to make, vend or use the same is vested exclusively in the patentee, his heirs and assigns for a limited period; it is not true that a right to make, vend or use the same in a manner which would be unlawful except for the letters patent, thereby becomes lawful, under the act of Congress, and beyond the power of the States to regulate or control. This doctrine is fully discussed and settled in Jordan v. The Overseers of Dayton, 4 Ohio R. 295, and Patterson v. Kentucky, 97 U. S. Supreme Court, 501. The doctrine of these cases may be stated thus: The right to enjoy a new and useful invention may be secured to the inventor and protected by national authority against all interference; but the use of tangible property which comes into existence by the application of the discovery, is not beyond the control of State legislation, simply because the patentee acquires a monopoly in his discovery. "The sole operation of the statute is to enable him to prevent others from using the products of his labors without his consent; but his own right of using is not enlarged or affected." The property of an inventor in a patented machine, like all other property, remains subject to the paramount claims of society, and may be controlled and regulated by State laws when the public welfare requires it.

It appears to us, as a proposition too plain to admit of argument, that where the beneficial use of patented property, or any species of property, requires public patronage and governmental aid, as, for instance, the use of public ways and the exercise of the right of eminent domain, the State may impose such conditions and regulations as in the judgment of the law-making power are necessary to promote the public good.

As respects the Western Union Telegraph Company, we are of opinion that no case has been made which will justify a judgment against it, but as to the respondents, the Columbus Telephone Company and the Bell Telephone Company, the writ of *mandamus*, as prayed for, should be made peremptory.

Judgment accordingly.

ABSTRACTS OF RECENT DECISION.

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

MUNICIPAL BONDS—CONSTRUCTION OF STATUTE—POPULAR VOTE—COUPONS—INTEREST.—In this case it appears that Walnut Township, Illinois, issued bonds for $40,000, in aid of the Illinois Grand Trunk Railway Company, and this suit is brought upon coupons for interest on such bonds due January 1, 1875. The case was submitted to the court upon the issues of fact as well as of law. The court made a special finding to the following effect: First, that the town clerk and supervisor made the bonds in October, 1870; that coupons for interest were attached to the bonds; that they recited that they were issued to the Illinois Grand Trunk Railway Company by authority of an act passed March 25, 1869, entitled, "An act to amend an act entitled an act to incorporate the Illinois Grand Trunk Railway," and that such bonds were issued in pursuance of a vote of the people of the township taken June 25, 1870. Second, that in January, 1871, the bonds were issued to the Illinois Grand Trunk Railway Company; that in September, 1871, plaintiff bought in the New York market the bonds, with coupons attached, without notice of any defense against bonds or coupons. Third, that the "act to amend an act to incoporate the Illinois Grand Trunk Railway," was duly and constitutionally passed. Fourth, that the voters of the town voted $30.000 of bonds on the 25th of June, 1870, and $10.000 additional bonds on the 6th of August, 1870, in aid of the aforesaid railway company. Fifth, that the coupons in this case were from bonds numbered from 1 to 300. Upon this finding judgment was rendered for the plaintiff. It appeared that the act was passed under the Illinois Constitution of 1848, which, upon conditions, authorized such subscriptions by towns, etc.; on July 2, 1870, a new Constitution went into effect which prohibited them, but exempted from its operation such subscriptions as had been previously authorized by a vote, etc.

It was *held*, 1. That the finding of the court that the "act to amend, etc.," was duly and constitutionally passed was a finding of law, and was correct; that the finding having been excepted to, is subject to examination upon writ of error, but that the irregularity relied upon the omission of the word "Illinois" in the title of the bill, found in the journal of the Senate of Illinois, is a mere clerical error creating no ambiguity, and not operating to invalidate the act. 2. That the title of the act does express its object as required by the Constitution (Belleville R. Co. v. Gregory, 15 Ill. 20). 3. That under the act in question, the clerk and supervisor could subscribe the stock and issue the bonds (Windsor v. Hallett, 97 Ill. 209). 4. That as the finding of the court shows that the "voters" of the town voted for the subscription, that suffices to show the approval of the "inhabitants" as expressed in the act. 5. That the question whether or not the "company" approved the proposition to vote $30,000 to its aid, does not concern the plaintiff, he being a *bona fide* holder, is not bound to look beyond the act and the recitals of the bonds, if the approval of the company were a condition precedent that

only concerned the corporate authorities of defendant. 6. That there is nothing in the coupons that required before a suit brought that they should be presented for payment, and notice given to defendant of their non-payment. 7. that coupons for interest are negotiable and pass by delivery. 8. That interest was properly allowed on the amounts expressed in the coupons. 9. That the fact that bonds for $40,000 were issued when the vote of June 25, 1870, only authorized $30,000, does not affect plaintiff, he held the bonds that were authorized by the vote of June 25th, 1870. Affirmed. Error to the Circuit Court of the United States for the Northern District of Illinois. Opinion by Mr. Justice WOODS, —*Town of Walnut v. Wade.*

BANKRUPT LAW—DISCHARGE—FRAUD—CONSTRUCTION OF STATUTE—REPEAL.—Judgment was rendered for plaintiff in the Supreme Court of Massachusetts, in an action for false representations by defendant to plaintiff to induce him to sell certain goods. Defendant denied the false representations, and pleaded a composition order of the District Court of the United States, under the act of 1874. 18 United States Statutes, part 3, p. 183, sec. 17. Everything had been done under this act to bring plaintiff within its provisions. It is *held*, 1. That no debt created by fraud could be discharged by proceedings in bankruptcy, but the debt might be proved and the dividend be a payment in part of the debt. Rev. Stat. sec. 5117. 2. That the act of 1874 (*supra*), introducing the system of composition or discharge upon part payment of debts, is an amendment of the bankrupt law. 3. That proceedings under that act are proceedings in bankruptcy. 4. That all the acts on the subject of bankruptcy must be construed together as parts of a single system. 5. That, although plaintiff be brought within the terms of the act of 1874, his demand can not be affected by it, unless it be shown that the provisions of that act operate the discharge of defendant from liability to the plaintiff. 6. That the rule is, in the construction of statutes in *pari materia*, that the last only repeals the first where there are express terms of repeal, or where the implication is a necessary one; that the act of 1874 did not repeal the provision of the Rev. Stat. sec. 5117, which provides that in proceedings in bankruptcy, debts contracted by fraud are not to be discharged, and consequently the composition did not affect plaintiff's demand. Affirmed. Error to the Superior Court of Massachusetts. Opinion by Mr. Justice MILLER.— *Wilmott v. Mudge.*

COUNTY BONDS—JURISDICTION—NATIONAL BANKS—NEGOTIABLE PAPER.—In December, 1867, the Lebanon and Gallatin Railway Company was incorporated. By section 19 of the act the counties of Wilson and Sumner were authorized to subscribe for stock payable in county bonds, and to issue such bonds if authorized by the voters of the counties by an election to be held for that purpose. By section 35 the provisions of Chap. 3, Art. 3 of the Code of Tennessee was adopted as regulating the details of the election and the issuance of the bonds. Section 40 extended these provisions to the Tennessee and Pacific Railroad Company. This last named company availed itself of the privileges conferred upon it, and bonds were issued in its favor by the County of Wilson, and this suit was brought to collect some of them; they were payable to the company, and by its president transferred to bearer; there was a provision in the face of the bonds that they could be so assigned. There was judgment for the plaintiff. It is *held*, 1. That although both parties to the suit were citizens of Tennessee, the circuit court of the United States had jurisdiction, because section 629 of the Revised Statutes of the United States gives to those courts original jurisdiction in all cases by or against any banking association, etc., National Banks. 2. That the bonds were negotiable paper, having the endorsement of the president of the company they were in precisely the plight of a promissory note, payable to order and endorsed in blank. 3. That the County of Wilson had, by a very strong implication, the power to issue bonds. "What is implied in a statute is as much a part of it as what is expressed," (United States v. Babbit, 1 Black, 61), that such implication arises from Chap. 3, Art. 3 of the Code of Tennessee, and also the charter of the Gallatin & Lebanon Railway Company. 4. That the proof shows that all the surveys, etc. required by the laws and the charter had been duly performed before the issuance of the bonds. Affirmed. Error to the Circuit Court of the United States for the Middle District of Tennessee. Opinion by Mr. Justice WOODS. — *County of Wilson v. Third National Bank of Nashville.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES ANSWERED.

Query 21. [12 Cent. L. J. 383.] A statute of our State provides that a person practising law without license shall be fined $250. A, being unlicensed, performs services as attorney which are reasonably worth $500, and the employer (client) is perfectly satisfied with results, but refuses to pay. There was no contract covering fees. Can A recover on a *quantum meruit*? If so, how, and how much?

Woodville, W. Va. F. B. J.

Answer:—The answer may depend upon the purpose of the statute, which does not appear in the query. Was the license required only as a source of

revenue, or was the intent to keep unworthy persons from practicing law to the injury of the public? In either case the imposition of a penalty implies a prohibition of the act, although not expressly forbidden. Holt, J., Bartlett v. Vinor, Carthew, R. 252; Taylor v. Gas Co., 10 Exch. 293; Foster v. Taylor, 5 B. & Ad. 896; 2 M. & W. 157; 10 Bing. 110; 17 Mass. 258; 46 Iowa, 299. There is irreconcilable confusion in the cases, if the purpose was the first above named, "for revenue only." Many hold that in such a case an action will lie for services, though no license has been obtained; there being no real purpose to defraud the government. 11 East. 180; 10 B. & C. 93; 5 Taunt. 181; 12 Q. B. 905; 14 M. & W. 452; 6 Scott, 794; 12 How. U. S. 79; 3 Denio. 226; 14 N. Y. 196. But the balance of authority is decidedly the other way, especially in the courts of this country. Forden v. Cunningham, 20 How. Pr. 154; Best v. Bander, 29 How. Pr. 489; Cope v. Rowland, 2 M. & W. 149; Ritchie v. Smith, 6 Com. B. 462; Smith v. Linde, 4 Com. B. (N. S.) 395; Smith v. Linde, 5 Com. B. (N.S.) 587; Woods v. Armstrong, 25 Am. 671, and the elaborate note thereto. Taliafero v. Moffit, 54 Ga. 150; Shepler v. Scott, 85 Pa. St. 329; Costello v. Goldbeck, 9 Phila. (Pa.) 158; The Pioneer, Deady, U. S. 72. The text books arrive at no settled conclusion. *Dicta* and decision are left in hopeless confusion. *Vide* Smith on Cont., 228-234, 6th Am. Ed.; 1 Story on Cont., secs. 614, 620, 621, 4th ed; 2 Chitty on Contracts, 1003-1006, 11th Am. ed. The only sensible rule is that the act being penal is illegal, though not expressly forbidden, and as the party is engaged in an illegal act, he should not be permitted to maintain an action based upon his illegal practices. "*Ex dolo malo non oritur actio.*" If the Virginia statute had forbidden the practice of the law without first obtaining a license, etc., it is clear, by all the authorities, that he could not recover, although the statute had no purpose only to provide a revenue. 13 Am. 737. D. L. A.

Sherburne, N. Y.

Query 27. [12 Cent. L. J. 503.] The Constitution of Arkansas, article 9, section 3, provides that "the homestead of any resident of this State, who is married or the head of a family, shall not be subject to the lien of any judgment or decree of any court, or sale under execution, or other process known, except for purchase-money, specific liens, tax and for special trusts," etc. Can a non-resident owning lands in this State, which lands have been attached for debt on grounds of non-residence, after the levy of the writ, and thereby the creation of the attachment lien, and before judgment, move to this State and, upon the attached lands, assert his residence, claim the land as a homestead as a defense, and thereby supersede and defeat the attachment lien at the trial? W.

Yellville, Ark., May 14, 1881.

Answer No. 1. His lien is no better than a judgment lien, which may be defeated by occupation at any time prior to sale, under process. He can defeat the attachment lien by citizenship and occupation at the day of the sale, notwithstanding the lien. Trotter v. Dobbs, 38 Miss. 198, Lessley v. Phipps, 49 Miss. 790; Litchford v. Carey, 52 Miss. 791. G. E. H.

Answer No. 2. No. See Bullene v. Hiatt, 12 Kas. 98. S.

Osage Mission, Kas., May 28, 1881.

Answer No. 3. The inquirer from Yellville, Ark., will find the following authorities supporting his attachment proceedings, viz.: Mabry v. Harrison, 44 Texas. 286; Houston, etc. R. Co. v. Winter, 44 Texas, 597; Kelly v. Dill, 23 Minn. 435, Krisin v. Marr, 15 Minn. 116; Robinson v. Wilson, 15 Kas. 595; Bullene v. Hiatt, 12 Kas. 98; Elston v. Robinson, 21 Iowa, 531; Hale v. Heaslip, 16 Iowa, 452. There is no reason to suppose from the language of art. 9, sec. 3, Constitution of Arkansas, that it was intended to give to the debtor the power, by his own acts, to deprive others of rights previously obtained or acquired in his property. F. R.

Atchison, Kan., May 28, 1881.

RECENT LEGAL LITERATURE.

WOOD ON LANDLORD AND TENANT. A Treatise on the Law of Landlord and Tenant, with copious Notes and References. By H. G. Wood, author of the Law of Fire Insurance. New York, 1881: Banks and Brothers.

The importance of the subject of this volume will make its appearance welcome to many practitioners, notwithstanding the fact that it may be considered by some that the field is already pretty well occupied. It is, however, a topic that will bear discussion. Originating in the artificial and antiquated principles of the common law, it has received many novel and discordant accessions by statutory enactment. In addition to this, the subject is a much litigated one, and consequently in every State there are numerous, and, in many instances, conflicting adjudications from which it is extremely difficult to deduce any systematic and logical rule. Necessarily a volume devoted to such a subject, which is intended to be at all exhaustive must necessarily reach very considerable proportions. The one before us contains 1000 pages of text, 75 of index, and 77 of table of cases. Of course it is impossible within the space of a short book review to examine a work of such proportions with that minute care that would enable us to speak authoritatively of its merits. One evidence of diligence, however, which is strikingly prominent is the table of cases containing references to nearly 10,100 English and American adjudications. The work is well printed and bound, and presents a very creditable appearance.

NOTES.

——At a recent divorce trial in Indiana, the wife, being libellant. and the first witness called to the stand in her own behalf, created a profound sensation in court by kneeling reverently at the witness chair, and invoking in a clear and earnest voice Divine aid, for strength to carry her through the coming ordeal, and to be enabled to tell truth, the whole truth, and nothing but the truth, and to abide the judgment of the court on whichsoever side it might fall. Whether her petition was heard at the bar of God or not, it was answered in the court below, for she was granted divorce, custody of her child, and liberal alimony.

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ness of such firm on account of vessels consigned to them, for freights collected, the deposits being made in the name of plaintiff's intestate on account of the financial embarrassments of said firm, for safe keeping, and in order that they might be paid over to the parties to whom they actually belonged; and where such funds were applied by the bank, the defendant, in payment of a matured indebtedness to it by the firm, upon the claim that the money was really deposited for the benefit of the firm, and became liable for their debt: *Held*, that the firm had no title to the moneys, and the defendants' demand was not the subject of set-off or recoupment against such moneys, they never having lost their original character, or been mingled with moneys of the firm. Falkland v. St. Nicholas Nat. Bank, 348.
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